98-5881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BENJAMIN LEE LILLY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

IRA S. SACKS
(Counsel of Record)
HECTOR O. VILLAGRA
LETICIA M. SAUCEDO
DARCY M. GODDARD (not admitted)
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A Partnership Including
Professional Corporations)
One New York Plaza
New York, New York 10004-1980
(212) 859-8000

Counsel for Petitioner

234 pp

Table of Contents

ness licenses, and paying the meal tax bond. Thus, had the building permit been denied, the same legal question could have been raised.

[3] We also reject the Board's contention that the circuit court erred in considering other sections of the zoning ordinance, specifically the definition of "used or occupied" in § 1–4.8. The circuit court did not *apply* this definition to § 12–9. Rather it looked to this section and others in the ordinance to determine the purpose and intent of the zoning ordinance, specifically § 12–9. This reference to other provisions *in pari materia* with the section at issue is an accepted method of statutory construction and did not constitute error by the circuit court. *See Prillaman v. Commonwealth*, 199 Va. 401, 405–06, 100 S.E.2d 4, 7–8 (1957).

[4, 5] Finally, we reject the Board's assertion that the circuit court erred by failing to extend the presumption of correctness to the Board's decision. It is well established that the decision of a board of zoning appeals is presumed to be correct and will be reversed or modified only if the board applied erroneous principles of law or was plainly wrong and in violation of the purpose and intent of the zoning ordinance. *Foster v. Geller*, 248 Va. 563, 566, 449 S.E.2d 802, 804–05 (1994). Furthermore, great weight must be given to the consistent construction of an ordinance by the official charged with enforcing the ordinance. *Cook v. Board of Zoning Appeals of the City of Falls Church*, 244 Va. 107, 111, 418 S.E.2d 879, 881 (1992).

In support of its position, the Board only points again to those actions of the circuit court to which it assigned error: ignoring the testimony of the neighborhood resident, relying on the issuance of the building permit, and referring to other sections of the zoning ordinance in interpreting § 12–9. We have already held that the circuit court did not err in any of these particulars and we find nothing else in the record to suggest that, in reaching its decision, the circuit court ignored any of the principles which govern its review of the Board's decision in this case.*

Accordingly, for the reasons stated, we will affirm the decision of the circuit court.

Affirmed.

Benjamin Lee LILLY

v.

COMMONWEALTH of Virginia.

Record Nos. 972385, 972386.

Supreme Court of Virginia.

April 17, 1998.

Defendant was convicted in the Circuit Court, Montgomery County, Ray W. Grubbs, J., of capital murder and was sentenced to death. Defendant appealed. The Supreme Court, Koontz, J., held that: (1) defendant was not entitled during voir dire to "educate" jurors on issue of parole ineligibility of defendants upon whom life sentences are imposed; (2) defendant was not entitled to excusal for cause of juror who was police officer-witness's second cousin; (3) permitting Commonwealth to display enlarged "in life" photograph of victim to jury during guilt phase was not abuse of discretion; (4) defendant's accomplice's statement to police was admissible as declaration against accomplice's penal interest; (5) defendant's incriminating statement to police chief did not occur during custodial interrogation; (6) evidence that dried blood was found on back of defendant's pant leg was admissible; (7) refusal to strike testimony of witness who allegedly violated sequestration order was not abuse of discretion; (8) defendant was not entitled to jury instruction on voluntary intoxication; and (9) defendant was not entitled to penalty phase instruction directing jury to "impose the low-

* We are not called upon to consider whether the circuit court's interpretation of § 12–9 is correct because the validity of that interpretation was not the subject of an assignment of error.

er grade" of punishment if there was reasonable doubt as to grade.

Affirmed.

1. Jury ⇐131(4)

A party must have a full and fair opportunity to examine the venire, but the trial court retains discretion to determine when a defendant has had such an opportunity.

2. Jury ⇐131(1)

Capital murder defendant was not entitled during voir dire to "educate" jurors on issue of parole ineligibility of defendants upon whom life sentences are imposed in capital murder cases.

3. Criminal Law ⇐1134(5)

In considering claim that jurors should not have been excused for cause, Supreme Court considers voir dire as whole, not just isolated statements.

4. Criminal Law ⇐1158(3)
Jury ⇐85

The trial court's decision whether to strike a prospective juror for cause is a matter submitted to its sound discretion and will not be disturbed on appeal unless it appears from the record that the trial court's action constitutes manifest error.

5. Jury ⇐108

Three jurors who expressed strong moral or religious reservations about their abilities to impose sentence of death, but who, with some continuing equivocation, ultimately stated that they could follow trial court's instructions, were properly removed for cause in capital murder case.

6. Jury ⇐33(2.15)

Removal for cause of three jurors who were adamant in their personal opposition to capital punishment and could not impose death sentence did not violate capital murder defendant's right to be tried by impartial jury selected from representative cross-section of community. U.S.C.A. Const.Amend. 6.

7. Jury ⇐90

Refusal to excuse for cause juror who stated during voir dire that he was acquainted with police chief, to whom defendant made incriminating statement, was not manifestly erroneous in capital murder case, even though juror also stated that he might give more credence to chief's testimony; upon further examination, juror stated that he could set aside his acquaintance with chief and consider testimony of all witnesses on equal plane.

8. Jury ⇐90

Refusal to excuse for cause juror who stated during voir dire that he was second cousin and "real good friend" of law enforcement official who was prospective witness for Commonwealth was not manifestly erroneous in capital murder case; juror testified that such relationship and friendship would not be factor in considering that official's testimony against that of other witnesses.

9. Jury ⇐100

Capital murder defendant was not entitled to excusal for cause of juror who had read newspaper article about defendant's past; juror testified that article had not prejudiced her.

10. Jury ⇐83(1)

It is the duty of the trial court, through the legal machinery provided for that purpose, to procure an impartial jury to try every case.

11. Jury ⇐90

Investigator who was potential witness for prosecution in murder case, and whose role in investigation of murder was significant to prosecution's case, was not "party" to that case; thus, defendant was not entitled to excusal for cause of juror who was investigator's second cousin, and who stated that such relationship and friendship would not be factor in considering investigator's testimony against that of other witnesses. Code 1950, § 8.01-358; Sup.Ct.Rules, Rule 3A:14(1).

See publication Words and Phrases for other judicial constructions and definitions.

12. Jury ⇐90

Even though victim is not party to proceeding, person is disqualified from serving as juror if he is related to victim. Code 1950, § 8.01-358; Sup.Ct.Rules, Rule 3A:14(1).

13. Jury ⇐90

When a law enforcement officer's sole role in a criminal prosecution is as a witness, he is not a "party" to that case; thus, a juror's relationship to such a police officer-witness does not require per se dismissal of that juror from the venire, and the juror may be retained if the trial court is satisfied that the juror can set aside considerations of the relationship and evaluate all the evidence fairly.

14. Criminal Law ⇐126(2)

Capital murder defendant was not entitled to change of venue on ground that pretrial publicity had potentially prejudiced members of venire; selection of jury panel had not proved difficult, with fewer than half of jurors stating that they had heard or read about case, and with none showing particular bias as result of pre-trial publicity.

15. Criminal Law ⇐134(1)

A presumption exists that the defendant will receive a fair trial in the jurisdiction in which the offense occurred.

16. Criminal Law ⇐134(1)

In order to overcome the presumption that the defendant will receive a fair trial in the jurisdiction in which the offense occurred, the defendant must demonstrate that the citizens of the jurisdiction feel such prejudice against him that it is reasonably certain he cannot receive a fair trial.

17. Criminal Law ⇐121

The decision whether to grant a change of venue lies within the sound discretion of the trial court.

18. Criminal Law ⇐126(1)

The fact that there have been media reports about the accused and the crime does not necessarily require a change of venue.

19. Criminal Law ⇐126(1)

In determining whether media reports about the accused and the crime require a change of venue, the trial court should consider the difficulty encountered in selecting a jury as a significant factor in determining whether actual prejudice has resulted from the publicity.

20. Criminal Law ⇐715

Permitting Commonwealth to display enlarged "in life" photograph of victim to jury during guilt phase of capital murder trial was not abuse of discretion, despite claim that photo was inherently prejudicial because it tended to invoke sympathy for victim.

21. Criminal Law ⇐438(4, 5.1, 8)

Neither admission of photographs depicting crime scene of murder, including graphic images of victim, nor trial court's denial of defendant's request that black-and-white photographs be substituted for color photographs, was error during guilt phase of capital murder trial; court reviewed photographs proffered as potential exhibits by Commonwealth and excluded autopsy photographs, which it found excessively graphic, crime scene photographs accurately depicted scene of crime, and probative value of color photographs outweighed potential prejudice of their content.

22. Criminal Law ⇐438(4)

A graphic photograph is admissible so long as it is relevant and accurately portrays the scene of the crime.

23. Criminal Law ⇐438(5.1), 1153(1)

The admission into evidence of photographs of the body of a murder victim is left to the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion.

24. Criminal Law ⇐438(8)

Videotapes showing the crime scene and the victim are admissible to show motive, intent, method, malice, premeditation, and the atrociousness of the crime.

25. Criminal Law ⇐438(8)

If a videotape accurately depicts the crime scene, it is not rendered inadmissible simply because it is gruesome or shocking.

26. Criminal Law ⇐438(8), 1153(1)

As with other photographic evidence, the admission of a crime scene videotape rests within the sound discretion of the trial court, and the trial court's decision will not be reversed on appeal absent a showing of abuse of that discretion.

27. Criminal Law ⇐422(5)

Capital murder defendant's accomplice's statement to police, implicating defendant as triggerman in murder, was admissible as declaration against accomplice's penal interest when he invoked his right against self-incrimination under Fifth Amendment, despite defendant's claim that such statements were self-serving and tended to exculpate accomplice by shifting responsibility to defendant and third party for majority of criminal acts those three committed; accomplice was cognizant of import of his statements and that he was implicating himself as participant in numerous crimes for which he could be charged, convicted, and punished, and elements of his statements were independently corroborated. U.S.C.A. Const.Amend. 5.

28. Criminal Law ⇐417(15)

To be admissible as a declaration against penal interest, an out-of-court statement must be made by an unavailable declarant.

29. Criminal Law ⇐417(15)

A declarant is unavailable, for purposes of the hearsay exception for an out-of-court statement against penal interest by an unavailable declarant, if the declarant invokes the Fifth Amendment privilege to remain silent. U.S.C.A. Const.Amend. 5.

30. Criminal Law ⇐417(15)

For an out-of-court statement to be considered as being against the unavailable declarant's penal interest, it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein; rather, the statement's admissibility is based upon the subjective belief of the declarant that he is making admissions against his penal interest and upon other evidence tending to show that the statement is reliable.

31. Criminal Law ⇐417(15)

In determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given.

32. Criminal Law ⇐662.11

Admission of capital murder defendant's accomplice's statement to police, implicating defendant as triggerman in murder, as declaration against accomplice's penal interest did not violate defendant's right to confront and cross-examine accomplice, who exercised his Fifth Amendment privilege against self-incrimination; accomplice's statement bore sufficient indicia of reliability. U.S.C.A. Const. Amends. 5, 6.

33. Criminal Law ⇐662.1, 662.8

The right of confrontation is not absolute; thus, a statement sufficiently clothed with indicia of reliability is properly placed before a jury even though there is no confrontation with the declarant. U.S.C.A. Const.Amend. 6.

34. Criminal Law ⇐1166(10.10)

Assuming that discovery motion and subsequent order of trial court required prosecution to disclose duplicate tapes of defendant's accomplice's recorded statement to police, rather than merely disclosing transcripts of that recording, defendant was not prejudiced by Commonwealth's failure to disclose duplicate tapes; defendant was supplied with accurate transcripts of recording prior to trial, and was offered opportunity to review recordings before they were played to jury.

35. Criminal Law ⇐412.1(1, 4)

Conversation in which capital murder defendant, before having been informed of his right to counsel and his right against self-incrimination, said "me" when police chief asked him "what does a murderer look like anyway?" was not custodial interrogation; defendant initiated conversation, and statement was voluntary. U.S.C.A. Const.Amends. 5, 6.

36. Criminal Law ⇐412.1(1)

Police chief was not precluded from testifying in capital murder trial that defendant said "me" when police chief asked him "what does a murderer look like anyway?", despite defendant's claim that such testimony was unreliable since in preliminary testimony chief testified only that he "thought" defendant had said "me"; chief testified at trial that he was certain of what defendant said, and defendant was not prohibited from cross-examining chief concerning his certainty as to statement.

37. Criminal Law ⇐1169.12

Even if law enforcement officer's testimony that capital murder defendant declined to submit to gunpowder residue test, which defendant was erroneously told was voluntary, violated defendant's right against self-incrimination, any error was harmless; because evidence showed that defendant fired one or more guns taken in breaking and entering prior to murder, jury was aware that gunpowder residue test would have been positive for that reason alone. U.S.C.A. Const.Amend. 5.

38. Criminal Law ⇐393(1)

Capital murder defendant's act of rubbing his hands together in apparent attempt to destroy any gunpowder residue on his hands, after being asked to take gunpowder residue test that he was erroneously told was voluntary, was nonverbal act that went beyond mere refusal to submit to test and, as such, was not subject to exclusion under right against self-incrimination. U.S.C.A. Const.Amend. 5.

39. Homicide ⇐174(2)

Evidence that dried blood was found on back of capital murder defendant's pant leg was admissible, even though Commonwealth alleged defendant was facing victim at time of shooting, and despite claim that, because no test was conducted to determine whether blood was of human origin, it was as likely that blood came from geese defendant and his associates shot earlier in day; presence of bloodstains was probative, however slightly, of defendant's involvement in murder, and lack of scientific determination that blood was from human source was matter of weight and credibility, if any, of that evidence for jury to consider.

40. Criminal Law ⇐1169.1(10)

To extent, if any, that contents of medical examiner's report on murder victim contained references to tests not performed by proponent of report, and thus fell outside exception to hearsay rule provided for medical examiners' reports, its admission was harmless; defendant failed to show how any of that material was prejudicial and not merely cumulative of properly admitted evidence. Code 1950, § 19.2-188.

41. Criminal Law ⇐1036.1(9)

Capital murder defendant failed to preserve for appellate review his claim that trial court erred by refusing to admit statement made by defendant's associate, who was with defendant at time of murder, that associate would be able to kill his best friend and feel no remorse; defendant initially objected to statement's admission, then later sought its admission over Commonwealth's objection, and after Commonwealth subsequently withdrew its objection, trial court reversed its ruling to exclude statement, but defendant failed to recall witness.

42. Criminal Law ⇐665(6)

Refusal to strike testimony of witness who was not aware of witness sequestration order, and who testified that exposure to newspaper article did not affect his testimony, was not abuse of discretion.

43. Criminal Law ⇐665(1)

Sequestration of witnesses is not a right, but a power wholly within the discretion of the trial court.

44. Homicide ⇐294.2

Capital murder defendant was not entitled to jury instruction on voluntary intoxication, as his actions suggested that he was fully in command of his faculties and acted with deliberation; he was able to operate automobile both before and after murder, and during his flight immediately after murder he committed robberies to facilitate his continued flight and took steps to deliberately conceal his involvement in murder.

45. Homicide ⇐28

Only exception to general rule that voluntary intoxication is not excuse for any crime is that when person voluntarily becomes so intoxicated that he is incapable of deliberation or premeditation, he cannot commit class of murder that requires proof of deliberate and premeditated killing; mere intoxication, however, will not negate premeditation.

46. Criminal Law ⇐796

It is inappropriate in penalty phase of capital trial to direct jury to consider "residual doubt" of guilt in considering sentence.

47. Homicide ⇐311

Capital murder defendant was not entitled to penalty phase instruction directing jury to "impose the lower grade" of punishment if there was reasonable doubt as to grade of punishment to be imposed; this instruction was both confusing and redundant of instruction already accepted by trial court which directed jury that Commonwealth was required to present evidence beyond reasonable doubt of existence of one or both of aggravating factors necessary for imposition of death penalty.

48. Criminal Law ⇐1134(3)

In conducting its proportionality review in a death penalty case, the Supreme Court must determine whether other sentencing bodies in the jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant. Code 1950, § 17–110.1, subd. C, par. 2.

Max Jenkins; Christopher A. Tuck (Jenkins & Jenkins, on briefs), Radford, for appellant.

Katherine P. Baldwin, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: All the Justices.

KOONTZ, Justice.

In this appeal, we review the capital murder conviction and death sentence imposed by a jury on Benjamin Lee Lilly (Lilly). Lilly was also convicted of lesser offenses arising out of the same occurrence, but does not directly challenge the sufficiency of the evidence to support his convictions for the lesser offenses.

I.

PROCEEDINGS

On April 1, 1996, indictments were returned against Lilly charging that on December 5, 1995, Lilly abducted and robbed Alexander V. DeFilippis, Code §§ 18.2–47 and 18.2–58, carjacked DeFilippis' vehicle, Code § 18.2–58.1, and subsequently murdered DeFilippis as part of the commission of the robbery, Code § 18.2–31(4). Lilly was also charged with use of a firearm in the principal offenses and for possession of a firearm after having previously been convicted of a felony. Code §§ 18.2–53.1 and 18.2–308.2(A)(i).

Lilly filed pre-trial motions to exclude evidence of a statement he made to Pearisburg Police Chief William Whitsett, to permit voir dire of jurors concerning parole ineligibility issues,[1] to exclude evidence of Lilly's refusal to submit to a paraffin gunpowder residue test, and for a bill of particulars. Lilly also sought to exclude from evidence statements made by Mark Lilly, Lilly's brother and a co-participant in these crimes, asserting that their admission would be a violation of the hearsay rule and of the confrontation clause. The trial court denied all of these motions. Lilly also filed a motion for a change of venue, which the trial court took under advisement pending selection of the jury.

Lilly also filed a discovery request seeking, *inter alia*, "[a]ll alleged confessions or statements of any kind made by the Defendant or any alleged co-conspirator ... in every media in which each such confession or statement may exist." The trial court granted the discovery motion and the Commonwealth supplied Lilly with, among other items, transcripts of the tape-recorded statements of Mark Lilly.

Jury selection began on October 15, 1996 and continued over four days. Trial commenced on October 21, 1996 and proceeded for five days, concluding with a jury verdict finding Lilly guilty on all counts of the indictments. The penalty phase of the trial occurred on October 28, 1996, concluding with a jury recommendation of a sentence of death for the capital murder charge and two life terms plus a total of 27 years for the lesser offenses. The trial court entered judgment on the jury's verdict and imposed the sentences by final order dated March 7, 1997.

1. In addition, Lilly sought to argue parole ineligibility as a mitigating factor and to submit jury instructions on this issue during the penalty phase. The trial court granted these portions of the motion.

II.

EVIDENCE

We will review the evidence in the light most favorable to the Commonwealth. *Clagett v. Commonwealth*, 252 Va. 79, 84, 472 S.E.2d 263, 265, *cert. denied*, — U.S. —, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997). Gary Wayne Barker, the Commonwealth's principal witness, shared a room with Mark Lilly. Barker testified that on the day before the murder, he, Lilly, and Mark Lilly were at Lilly's home "drinking" and smoking marijuana. Later, the three men drove to a friend's house to "drink a little bit with him." When they discovered that the friend was not at home, the three men broke into the house and stole several guns, a safe, and a quantity of liquor. They subsequently broke open the safe and divided its contents.

The three men then drove to Radford where they tried unsuccessfully to trade the stolen guns for marijuana. They then went to stay at the home of an acquaintance in Blacksburg. During this time they continued to drink and smoke marijuana.

The following morning, the three men drove over the back roads in the vicinity of Shawsville and Elliston, stopping to fire the stolen guns at some geese and killing one, which they put in the trunk of the car. They again attempted to trade the guns for marijuana at a trailer park and a bar in Blacksburg.

Near Heathwood, the car in which the three men were travelling broke down in the vicinity of a convenience store. They removed the liquor and guns from the car. DeFilippis, who had driven to the store with a friend, was inspecting a tire on his vehicle while his friend went into the store. Lilly, carrying one of the stolen guns, confronted DeFilippis and called for Barker and Mark Lilly to join him. Lilly ordered DeFilippis into DeFilippis' car and Mark Lilly and Barker also got into the vehicle. Lilly then drove the vehicle away from the store and ordered DeFilippis to surrender his wallet.

Lilly drove DeFilippis' car to an isolated point on the bank of the New River near Whitethorne, stopped the car, and ordered DeFilippis to get out. Mark Lilly was carrying one of the stolen guns, a pistol. The other guns were left in the car. Lilly ordered DeFilippis to strip to his underwear and walk away from the car. After throwing DeFilippis' clothing into the river, the three men returned to the car. Lilly took the pistol from Mark Lilly, ran up to DeFilippis, turned him around, and shot him four times, fatally striking him three times in the head and once in the arm.

Lilly returned to the car, leaving DeFilippis' body in the road. Barker and Mark Lilly asked Lilly why he had shot DeFilippis. He replied that DeFilippis had seen Lilly's face and that "I ain't going back" to the penitentiary.

The three men bought beer with the money they had stolen from DeFilippis and then drove to the McCoy River where they disposed of "anything that might have our prints on it," although they retained the murder weapon and the other guns. They then drove to "a little market" in Giles County, where they robbed the owners of cash and some merchandise.

Determining that the money from this robbery was not sufficient "[t]o get us out of ... town," they drove to another store, also in Giles County. Barker and Mark Lilly entered that store and attempted to rob the clerk. They were interrupted by the owner who grabbed Barker. Barker broke free and the two men fled to the car. The owner followed them as Lilly drove away. Barker fired one of the guns into the air to let the

owner know that they were armed, and he ended his pursuit.

A short time later, the car broke down. As the three men were removing the stolen merchandise from the car, police officers arrived. The three men fled on foot, with Barker and Lilly being captured almost immediately.

One of the officers responding to the report of these robberies was Police Chief Whitsett. While Lilly was sitting in a police car and Whitsett was standing nearby, Lilly asked Whitsett to place his shotgun in Lilly's mouth and pull the trigger. Whitsett refused and asked Lilly "if I looked like a murderer?" In reply to a comment made by Lilly, Whitsett then asked, "what does a murderer look like anyway?" Lilly replied, "me."

Barker and Mark Lilly both told the police about the DeFilippis murder in their statements. In his initial statement to police, Lilly did not mention the murder and maintained that the other two men had forced him to participate in the robberies.

We will recite other relevant facts and proceedings within the discussion of the assignments of error.

III.

ISSUES PREVIOUSLY DECIDED

Lilly has assigned error to the trial court's failure to order the Commonwealth to provide a general bill of particulars prior to trial, as well as a bill of particulars of the aggravating factors upon which the Commonwealth would rely during the penalty phase of the trial. Lilly has further assigned error to the trial court's finding that the Virginia death penalty statute is not unconstitutional. The arguments raised in these assignments of error have been thoroughly addressed and rejected in numerous prior capital murder cases. We find no reason to modify our previously expressed views on these issues. *Clagett*, 252 Va. at 85–86, 472 S.E.2d at 266–67.

IV.

JURY SELECTION

[1] Lilly assigns error to the trial court's refusal to allow him to depart from the trial court's approved list of questions during voir dire. The record shows that the trial court and counsel for the defense and the Commonwealth conferred extensively in advance of the voir dire concerning the questions to be asked of potential jurors. Lilly has failed to identify any question he was not allowed to ask or to show that any potential juror was not fully questioned. A party must have a full and fair opportunity to examine the venire, but the trial court retains discretion to determine when a defendant has had such an opportunity. *Buchanan v. Commonwealth*, 238 Va. 389, 401, 384 S.E.2d 757, 764 (1989), *cert. denied*, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990). Lilly has failed to demonstrate that he was in any way prejudiced by the trial court's limiting of the questions which could be put to prospective jurors, and we will not disturb the trial court's determination in this matter. *Id.*

[2] Lilly further asserts that the trial court erred in refusing to permit him to "educate" the jurors on the issue of parole ineligibility of defendants upon whom life sentences are imposed in capital murder cases. He contends that the requirement of *Simmons v. South Carolina*, 512 U.S. 154, 162, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994), that the trial court instruct the jury on parole ineligibility requires that the venire be informed on this issue at the outset of trial and that individual jurors may be questioned on their views of this issue. We disagree.

The clear import of *Simmons* is that, once a defendant is convicted of a capital crime, he has, as a matter of due process, the right to have the jury informed of his ineligibility for parole in order that this factor may be weighed by the jury against the finding of his further dangerousness to society. Nothing in *Simmons* even remotely suggests that knowledge of parole ineligibility rules and exploration of potential jurors' opinions on that subject would be a proper topic for voir dire.[2] The probable confusion and prejudice such an inquiry would cause in the minds of jurors is self-evident. Accordingly, we reject Lilly's contention that he should have been permitted to "educate" and examine the venire on this issue.

Lilly assigns error to the trial court's dismissal for cause of six members of the venire. Each of the prospective jurors expressed strong moral or religious reservations about her ability to impose a sentence of death. Three of the jurors, Connie Huffman, Kristina Mitchell, and Ollie Jones, ultimately agreed, but with some continuing equivocation, that they could follow the trial court's instructions.

[3] In asserting that these jurors should not have been excused, Lilly confines his argument to a discrete portion of the examination of each of them. We must consider the voir dire as a whole, not just isolated statements. *Mackall v. Commonwealth*, 236 Va. 240, 252, 372 S.E.2d 759, 767 (1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

[4, 5] The trial court's decision whether to strike a prospective juror for cause is a matter submitted to its sound discretion and will not be disturbed on appeal unless it appears from the record that the trial court's action constitutes manifest error. *Stockton v. Commonwealth*, 241 Va. 192, 200, 402 S.E.2d 196, 200, *cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991). In the present case, the trial court had the opportunity to observe each juror's demeanor when evaluating the juror's responses to the questions of counsel and the questions of the trial court. Nothing in the record suggests that the trial court abused its discretion in striking these jurors from the venire for cause despite the attempts of the defense to rehabilitate them.

[6] The trial court found that the other three prospective jurors, Ann Mumaw, Leona Wallace, and Janet Matheson, were adamant in their personal opposition to capital punishment and could not impose a death sentence. Lilly contends that by excluding them from the venire, he was denied the opportunity of having a jury of his peers. Where a juror has clearly indicated that she will be unable to follow the trial court's instructions and consider all the available penalties that might be imposed, it is appropriate for the trial court to excuse the juror for cause. *Gray v. Commonwealth*, 233 Va. 313, 334, 356 S.E.2d 157, 168, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). The elimination of such jurors from the venire "does not violate the right of a defendant in a capital case to be tried by an impartial jury selected from a representative cross-section of the community." *Id.* at 335, 356 S.E.2d at 169; *see also Poyner v. Commonwealth*, 229 Va. 401, 413–14, 329 S.E.2d 815, 825 (1985).

[7] Lilly assigns error to the retention of three members of the venire over his motion that they be excused for cause. James Rakes stated during voir dire that he was acquainted with Chief Whitsett and that he might give more credence to Whitsett's testimony as a result. Upon further examination, Rakes stated that he could set aside his acquaintance with Whitsett and consider the testimony of all the witnesses on an equal plane.

[8] Samuel Shumate stated during voir dire that he was a second cousin and "real good friend" of Investigator Ron Hamblin, a prospective witness for the Commonwealth. Shumate testified that his relationship and friendship with Hamblin would not be a factor in considering Hamblin's testimony against that of other witnesses.

[9] Lilly also asserts that an unidentified juror was permitted to remain on the jury panel after having "read a newspaper article about Mr. Lilly's past." Lilly initially objected to the seating of any juror who had been exposed to specific newspaper articles, and this assignment of error apparently relates to a member of the venire who had read one of the articles and was actually seated on the final jury panel. In addressing the issue immediately prior to trial, the trial court

2. The record reflects that the jury was properly instructed on parole ineligibility during the penalty phase of the trial and that Lilly was permitted to argue that his parole ineligible status militated in favor of a life sentence.

reiterated that it accepted the juror's testimony that the article had not prejudiced her.

As noted above, the decision to retain or excuse a juror rests within the sound discretion of the trial court. Here, the trial court had the opportunity to observe these three jurors and evaluate their responses to the questions put to them. Nothing in the record suggests that the refusal to strike these jurors constitutes manifest error by the trial court, and we will not disturb the trial court's exercise of its discretion in these instances. *Stockton, supra.*

[10–12] Lilly further maintains that juror Shumate should have been excused on the ground that Shumate was related to a "party" to the suit.[3] Code § 8.01-358; Rule 3A:14(1). With respect to the application of this rule in criminal cases, we have held that, even though the victim is not a party to the proceeding, a person is disqualified from serving as a juror if he is related to the victim. *Jaques v. Commonwealth*, 51 Va. (10 Gratt.) 690, 695 (1853); *see also Gray v. Commonwealth*, 226 Va. 591, 593–94, 311 S.E.2d 409, 410 (1984).

[13] Lilly asserts that Investigator Hamblin is a "party" to this criminal proceeding. Lilly apparently bases this assertion on the fact that this officer's role in the investigation of the crimes in question was significant to the prosecution's case. Although we have not previously addressed this issue, we hold that when the officer's sole role in a criminal prosecution is as a witness, he is not a "party" within the meaning of Code § 8.01-358 and Rule 3A:14(1). Thus, a juror's relationship to such a police officer-witness does not require *per se* dismissal of that juror from the venire, and the juror may be retained if the trial court is satisfied that the juror can set aside considerations of the relationship and evaluate all the evidence fairly. *See State v. Lee*, 559 So.2d 1310, 1317 (La.1990); *State v. Hunt*, 115 N.J. 330, 558 A.2d 1259, 1267–68 (1989); *Arner v. State*, 872 P.2d 100, 104 (Wyo.1994).

V.

VENUE

[14] After the jury panel was selected, the trial court, which had deferred consideration of the motion, denied Lilly's motion for a change of venue made on the theory that pre-trial publicity had potentially prejudiced the members of the venire. The trial court noted that the selection of the jury panel had not proved difficult, with fewer than half of the jurors stating that they had heard or read about the case, and with none showing particular bias as a result of the pre-trial publicity. Lilly asserts that the trial court erred in not granting the change of venue. We disagree.

[15–17] A presumption exists that the defendant will receive a fair trial in the jurisdiction in which the offense occurred. *Stockton*, 227 Va. at 137, 314 S.E.2d at 379–80. In order to overcome that presumption, the defendant must demonstrate that the citizens of the jurisdiction feel such prejudice against him that it is reasonably certain he cannot receive a fair trial. *Id.* Accordingly, the decision whether to grant a change of venue lies within the sound discretion of the trial court. *George v. Commonwealth*, 242 Va. 264, 274, 411 S.E.2d 12, 18 (1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992).

[18, 19] The fact that there have been media reports about the accused and the crime does not necessarily require a change of venue. *Buchanan*, 238 Va. at 407, 384 S.E.2d at 767–68. The trial court should consider "the difficulty encountered in selecting a jury" as a significant factor in determining whether actual prejudice has resulted from the publicity. *Mueller v. Commonwealth*, 244 Va. 386, 398, 422 S.E.2d 380, 388 (1992), *cert. denied*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993). The record here adequately reflects that the trial court acted well within its sound discretion in denying a change of venue in light of the ease with which a qualified jury panel was selected.

3. The Commonwealth asserts that Lilly did not raise this issue below and should be barred from raising it for the first time on appeal. Rule 5:25. However, in noting his objection to the trial court's retention of Shumate, Lilly's counsel stated, "This is a relative and this is a friend." "It is the duty of the trial court, through the legal machinery provided for that purpose, to procure an impartial jury to try every case." *Salina v. Commonwealth*, 217 Va. 92, 93, 225 S.E.2d 199, 200 (1976). The objection noted the family relationship and was sufficiently clear to raise the issue of whether the juror could "stand indifferent to the cause." Code § 8.01-358.

VI.

GUILT PHASE

A. Commonwealth's Use of Photographs and Videotape

[20] During its opening statement, the Commonwealth displayed an enlarged "in life" photograph of the victim to the jury. At the conclusion of that opening statement, Lilly made a motion for a mistrial, asserting that the photograph showing the victim alive was inherently prejudicial because it tended to invoke sympathy for the victim. The trial court found that there was no prejudice to the defendant as a result of the use of the photograph and overruled the motion, but directed that the Commonwealth remove the photograph from further display. Lilly assigns error to the trial court's failure to grant a mistrial.

Lilly cites no authority for the proposition that photographs of the victim taken before his death are inherently prejudicial, an issue not previously addressed in this Commonwealth. Those jurisdictions that have considered the issue have held that there is no inherent prejudice in the use of in life photographs of the victim, especially where the jury will also view crime scene photographs showing the victim. *See, e.g., State v. Broberg*, 342 Md. 544, 677 A.2d 602, 610 (1996). Thus, the use of in life photographs is a matter committed to the discretion of the trial court unless clearly prejudicial. *Id.; State v. Brett*, 126 Wash.2d 136, 892 P.2d 29, 41 (1995); *cf. Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155, 158 (1978) (in life photographs of victim with his handicapped daughter were prejudicial). We hold that it was within the sound discretion of the trial court to determine that Lilly was not prejudiced by the limited display of the in life photograph of the victim, and we find no abuse of that discretion in this instance.

[21] Lilly assigns error to the admission of certain other photographs and the trial court's denial of his request that black-and-white photographs be substituted for color photographs. These photographs depicted the crime scene of the murder, including graphic images of the victim.

[22, 23] A graphic photograph is admissible so long as it is relevant and accurately portrays the scene of the crime. *Clozza v. Commonwealth*, 228 Va. 124, 135, 321 S.E.2d 273, 280 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). The admission into evidence of photographs of the body of a murder victim is left to the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion. *Williams v. Commonwealth*, 234 Va. 168, 177, 360 S.E.2d 361, 367 (1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

The record shows that the trial court reviewed the photographs proffered as potential exhibits by the Commonwealth and excluded the autopsy photographs, which it found excessively graphic. We find no abuse of discretion in the admission of the crime scene photographs, since these accurately depicted the scene of the crime. Similarly, it was within the sound discretion of the trial court to determine whether the probative value of color photographs outweighed the potential prejudice of their content.

[24–26] Lilly also assigns error to the admission of a videotape of the crime scene of the murder. Videotapes showing the crime scene and the victim are admissible to show motive, intent, method, malice, premeditation, and the atrociousness of the crime. *Spencer v. Commonwealth*, 238 Va. 295, 312, 384 S.E.2d 785, 796 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990); *Stamper v. Commonwealth*, 220 Va. 260, 270–71, 257 S.E.2d 808, 816 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). If the videotape accurately depicts the crime scene, it is not rendered inadmissible simply because it is gruesome or shocking. *Goins v. Commonwealth*, 251 Va. 442, 459, 470 S.E.2d 114, 126, *cert.*

denied, 519 U.S. ——, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996). As with other photographic evidence, the admission of a crime scene videotape rests within the sound discretion of the trial court, and the trial court's decision will not be reversed on appeal absent a showing of abuse of that discretion. *Id.* We find no abuse of discretion in the admission of crime scene videotape here.

B. Admission of Mark Lilly's Statement

[27] At trial, Mark Lilly was called as a witness for the Commonwealth, but invoked his right against self-incrimination under the Fifth Amendment. Asserting that Mark Lilly was unavailable as a witness, the Commonwealth sought to introduce his pre-trial statements to police as declarations against his penal interest. Lilly objected on the ground that these statements did not fall within this hearsay exception because they were self-serving and tended to exculpate Mark Lilly by shifting responsibility to Lilly and Barker for the majority of the criminal acts the three men committed.

In his statements, Mark Lilly contended that he stole only liquor during the breaking and entering of the house of Lilly's friend, but that Lilly and Barker "got some guns or something." He further directly implicated Lilly as the instigator of the carjacking, saying that Lilly "wanted to get him another car." In the statements, Mark Lilly directly implicated Lilly as the triggerman in the murder and asserted that he and Barker "didn't have nothing to do with the shooting [of DeFilippis]."

[28, 29] To be admissible as a declaration against penal interest, an out-of-court statement must be made by an unavailable declarant. *Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978). "The law is firmly established in Virginia that a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent." *Boney v. Commonwealth*, 16 Va.App. 638, 643, 432 S.E.2d 7, 10 (1993); *see also Newberry v. Commonwealth*, 191 Va. 445, 462, 61 S.E.2d 318, 326 (1950).

[30] To be considered as being against the declarant's penal interest, it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein. *Chandler v. Commonwealth*, 249 Va. 270, 278–79, 455 S.E.2d 219, 224–25, *cert. denied*, 516 U.S. 889, 116 S.Ct. 233, 133 L.Ed.2d 162 (1995). Rather, the statement's admissibility is based upon the subjective belief of the declarant that he is making admissions against his penal interest and upon other evidence tending to show that the statement is reliable. *Id.*

Lilly concedes that statements of a declarant unavailable at trial are admissible if they qualify under the exception to the rule for declarations against penal interest. He asserts, however, that prior to *Chandler*, this exception was used only to permit the introduction of exculpatory evidence proffered by the defendant. In Lilly's view, *Chandler* improperly enlarged the exception to permit the Commonwealth to introduce statements of a co-participant which, though nominally against penal interest, actually seek to limit the declarant's culpability by implicating others, and, thus, are inherently unreliable. Accordingly, Lilly urges that *Chandler* was wrongly decided and should be overturned. We disagree.

We recognize that *Ellison*, *Newberry*, and other cases that applied this hearsay exception prior to *Chandler* involved the admission of such statements proffered by defendants for their exculpatory value. However, as we said in *Ellison*, the admission of such statements

> must be left to the sound discretion of the trial court, *to be determined upon the facts and circumstances of each case.* But, in any case, once it is established that a third-party confession has been made, the crucial issue is whether the content of the confession is trustworthy. And determination of this issue turns upon whether, in the words of *Hines* [*v. Commonwealth*, 136 Va. 728, 748, 117 S.E. 843, 849 (1923)], the case is one where "there is anything substantial other than the bare confession to connect the declarant with the crime."

219 Va. at 408–09, 247 S.E.2d at 688 (emphasis added).

[31] Thus, in determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given. Here, the record clearly shows that Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes for which he could be charged, convicted, and punished. Elements of Mark Lilly's statements were independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities. Thus, the statements were clothed in the necessary indicia of reliability to overcome the hearsay bar, and their admission rested well within the trial court's sound discretion. That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility.

[32] Lilly further asserts that the admission of Mark Lilly's statements violated his right of confrontation since he was denied the right to cross-examine the declarant. We disagree.

[33] The right of confrontation is not absolute. A statement sufficiently clothed with indicia of reliability is properly placed before a jury even though there is no confrontation with the declarant. *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 219–20, 27 L.Ed.2d 213 (1970).

> [W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.
>
> . . . .
>
> To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the " 'integrity of the factfinding process.' " . . . [A] statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.

White v. Illinois, 502 U.S. 346, 356–57, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992) (citations omitted). As noted above, admissibility into evidence of the statement against penal interest of an unavailable witness is a "firmly rooted" exception to the hearsay rule in Virginia. Thus, we hold that the trial court did not err in admitting Mark Lilly's statements into evidence.[4] *See Randolph v. Commonwealth*, 24 Va.App. 345, 353, 482 S.E.2d 101, 105 (1997); *Raia v. Commonwealth*, 23 Va. App. 546, 552, 478 S.E.2d 328, 331 (1996).

[34] Lilly further asserts that the Commonwealth was permitted to play tape recordings of Mark Lilly's statements to the jury, whereas it had only supplied Lilly with transcripts of those statements in response to Lilly's discovery request. The record reflects that the trial court offered defense counsel the opportunity to review the recordings before they were played to the jury. Assuming, without deciding, that the discovery motion and subsequent order of the trial court required disclosure of duplicate tapes rather than transcripts, we hold that Lilly was not prejudiced by the failure of the Commonwealth to do so. Having been supplied with accurate transcripts of the tape recordings prior to trial and having had an adequate opportunity to review them before they were played to the jury, there is no reasonable probability that the proceeding would have been different had duplicates of the tapes been provided to Lilly prior to trial. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383–84, 87 L.Ed.2d 481 (1985); *Robinson v. Commonwealth*, 231 Va. 142, 151, 341 S.E.2d 159, 164 (1986); *Briley*

4. Lilly further argues that he was unfairly prejudiced by the comments of the police contained within Mark Lilly's statements which he contends placed emphasis on Mark Lilly's truthfulness. However, the record shows that the officers merely encouraged Mark Lilly to tell them the truth.

v. Commonwealth, 221 Va. 563, 576, 273 S.E.2d 57, 65 (1980).

C. Admission of Lilly's Statement to Chief Whitsett

[35] Lilly assigns error to the admission of Chief Whitsett's testimony that Lilly said "me" when Whitsett asked Lilly "what does a murderer look like anyway?" Lilly asserts that Whitsett's conversation with him constituted a custodial interrogation prior to Lilly's having been informed of his right to counsel and his right against self-incrimination.

"Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.... Volunteered statements of any kind are not barred by the Fifth Amendment." *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966). Lilly's statement was clearly not the result of a custodial interrogation in that he initiated the conversation and the statement was voluntary. We hold, therefore, that the trial court did not err in permitting this statement into evidence. *Massie v. Commonwealth*, 211 Va. 429, 431–32, 177 S.E.2d 615, 617 (1970).

[36] Lilly further asserts that Whitsett's testimony was unreliable since in preliminary testimony Whitsett testified only that he "thought" Lilly had said "me." Whitsett testified at trial that he was certain of what Lilly said. Lilly was not prohibited from cross-examining Whitsett concerning his certainty as to the statement. Thus, it was a matter for the jury to weigh and determine. *Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982).

D. Miscellaneous Evidentiary Rulings

[37] Over Lilly's objection, Lieutenant Gary Price of the Giles County Sheriff's Office was permitted to testify that Lilly declined to submit to a gunpowder residue test and then began rubbing his hands together. Price testified that since he believed a gunpowder residue test constituted a search requiring a warrant or the consent of the suspect, he had informed Lilly that the test was voluntary. Price further testified that Lilly's rubbing his hands together would get rid of gunpowder residue.

Lilly concedes that he could have been required to take the test. However, Lilly contends that, because he was told that the test was "voluntary," the evidence of his refusal amounts to a use of a defendant's silence as an admission of guilt.

[38] We will assume, without deciding, that evidence of a defendant's refusal to submit to a gunpowder residue test after having been informed, erroneously, that the test was voluntary, is inadmissible as a violation of the Fifth Amendment right against self-incrimination.[5] Under the circumstances of this case, however, that error was harmless beyond a reasonable doubt. The record shows that Lilly fired one or more of the guns taken in the breaking and entering prior to the murder. Thus, the gunpowder residue test would have been positive for that reason alone, and the jury was aware of that circumstance. In addition, we hold that Lilly's act of rubbing his hands together in an apparent attempt to destroy any gunpowder residue on his hands was a nonverbal act that went beyond the mere refusal to submit to the test and, as such, was not subject to exclusion under the right against self-incrimination. *Accord Salster v. State*, 487 So.2d 1020, 1021 (Ala.Crim.App.1986) (defendant's nonverbal conduct in secreting contraband was not constitutionally protected); *see also Stevenson v. Commonwealth*, 218 Va. 462, 465, 237 S.E.2d 779, 781 (1977)(nonverbal conduct may be treated as an assertion).

[39] Lilly also assigns error to the admission of evidence that dried blood was found on the back of his pant leg. Lilly contends that the location of the bloodstain was inconsistent with its having resulted from the murder because the Commonwealth alleged Lilly was facing the victim at the time Lilly shot the victim. Lilly further asserts that no test was conducted to determine whether the blood was of human origin, and that it is as likely that this blood came from the geese that the men shot earlier in the day. Therefore, he asserts that the trial court abused its discretion in admitting this evidence. We disagree.

The presence of bloodstains on Lilly's clothing was probative, however slightly, of his involvement in the murder. The lack of a scientific determination that the blood was from a human source was a matter of the weight and credibility, if any, of that evidence for the jury to consider. The record does not show that Lilly was prohibited from questioning the Commonwealth's witnesses on this matter. Accordingly, we hold that admission of this evidence was not error.

[40] Lilly objected to the introduction of the medical examiner's report on the ground that it contained references to tests not performed by the proponent of the report. The Commonwealth responds that the trial court excluded from evidence a local medical examiner's report, admitting only the report prepared by the proponent or his staff. To the extent, if any, that the contents of the report admitted fell outside the exception to the hearsay rule provided for medical examiners' reports under Code § 19.2-188, we hold that Lilly has failed to show how any of that material was prejudicial and not merely cumulative of properly admitted evidence, and that in light of the other proof in the record, its admission was harmless beyond a reasonable doubt. *See Fitzgerald v. Commonwealth*, 223 Va. 615, 630, 292 S.E.2d 798, 807 (1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983).

[41] Lilly assigns error to the trial court's refusal to admit a statement made by Barker to a friend to the effect that Barker would be able to kill his best friend and feel no remorse. The record reflects, however, that Lilly initially objected to the statement's admission, then later sought its admission over the Commonwealth's objection. After the Commonwealth subsequently withdrew its objection, the trial court reversed its ruling to exclude the statement, but Lilly failed to recall the witness. Accordingly, we hold that this issue was not properly preserved for review.

E. Witness Sequestration Issue

[42] Barker, who had not been present when the trial court admonished the other witnesses to refrain from reading or observing media reports about the trial, testified that he had read a newspaper article the morning before he testified. The trial court reviewed the article and questioned Barker, who testified that nothing in the article affected his testimony. Lilly assigns error to the trial court's refusal to strike Barker's testimony.

[43] Sequestration of witnesses is not a right, but a power wholly within the discretion of the trial court. *Hampton v. Commonwealth*, 190 Va. 531, 553–54, 58 S.E.2d 288, 297 (1950). We cannot say that the trial court abused its discretion in refusing to strike the evidence of a witness who was not aware of the sequestration order and testified that the exposure to the newspaper article did not affect his testimony.

F. Jury Instruction Issue

[44, 45] Lilly assigns error to the trial court's refusal to grant his proposed instruction on voluntary intoxication. The facts, however, did not warrant the proposed instruction.

> Generally, voluntary intoxication is not an excuse for any crime. The only exception to this general rule is in cases involving deliberate and premeditated murder. Mere intoxication will not negate premeditation. However, when a person voluntarily becomes so intoxicated that he is incapable of deliberation or premeditation, he cannot commit a class of murder that requires proof of a deliberate and premeditated killing.

Wright v. Commonwealth, 234 Va. 627, 629, 363 S.E.2d 711, 712 (1988) (citations omitted).

Here, Lilly was able to operate an automobile both before and after the murder. During his flight immediately after the murder, he committed robberies to facilitate his continued flight and took steps to deliberately

5. See *Herring v. State*, 501 So.2d 19, 21 (Fla.Ct.App.1986) (informing defendant that gunpowder residue test is voluntary permits defendant to refuse test). *But see Wilson v. State*, 596 So.2d 775, 777–78 (Fla.Ct.App.1992) (criticizing and distinguishing *Herring*); *State v. Odom*, 303 N.C. 163, 277 S.E.2d 352, 355 (1981) (permitting evidence that defendant refused to submit to gunpowder residue test without attorney present).

conceal his involvement in the murder. All of these actions suggest that he was fully in command of his faculties and acted with deliberation. Nothing in the evidence suggests that he was so intoxicated as to be unable to form the requisite intent to commit premeditated murder. Accordingly, the trial court properly refused the proffered instruction on voluntary intoxication.

G. Prosecutorial Misconduct

Lilly assigns error to the trial court's refusal to grant a mistrial after the Commonwealth's Attorney allegedly pointed the murder weapon at Lilly and his counsel during closing argument. After making a cursory statement that the action of the prosecutor was prejudicial, Lilly addresses the remainder of his argument to the trial court's statement, "[T]hat's ridiculous. [The gun is] not pointed at you . . . nor is it pointed at anyone in this Courtroom," contending that it was an intentional disparagement of Lilly's counsel. This argument was not raised below, and may not be raised for the first time on appeal. Rule 5:25.

VII.

PENALTY PHASE ISSUES

[46, 47] Lilly assigns error to the trial court's refusal to grant a penalty phase instruction directing the jury to consider "residual doubt" of guilt in considering the sentence. We have previously held that such an instruction is inappropriate. *Stockton*, 241 Va. at 211, 402 S.E.2d at 207. Lilly also sought an instruction directing the jury to "impose the lower grade" of punishment if there was a reasonable doubt as to the grade of punishment to be imposed. The trial court properly ruled that this instruction was both confusing and redundant of an instruction already accepted by the trial court which directed the jury that the Commonwealth was required to present evidence beyond a reasonable doubt of the existence of one or both of the aggravating factors necessary for imposition of the death penalty.

VIII.

SENTENCE REVIEW

Under Code § 17-110.1(C)(1) and (2), we are required to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Lilly makes no particularized argument that passion, prejudice, or any other arbitrary factor influenced the jury's decision, and we find nothing in the record that would support such a finding.

[48] In conducting our proportionality review, we must determine "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." *Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993). We have examined the records of all capital murder cases reviewed by this Court, including those cases in which a life sentence was imposed. We have given particular attention to those cases in which, as here, the death penalty was based on both the "future dangerousness" and the "vileness" predicates.

Based on this review, we conclude that Lilly's death sentence is not excessive or disproportionate to penalties generally imposed by other sentencing bodies in the Commonwealth for comparable crimes. *See, e.g., Gray*, 233 Va. at 354, 356 S.E.2d at 180; *Stout v. Commonwealth*, 237 Va. 126, 137, 376 S.E.2d 288, 294, *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 609 (1989).

IX.

CONCLUSION

We find no reversible error in the judgment of the trial court. Having reviewed Lilly's death sentence pursuant to Code § 17-110.1, we decline to commute the sentence of death. Accordingly, we will affirm the trial court's judgment.

Affirmed.

Chauncey Jacob JACKSON

v.

COMMONWEALTH of Virginia.

Record Nos. 971720, 971721.

Supreme Court of Virginia.

April 17, 1998.

Following transfer from the Norfolk Juvenile and Domestic Relations District Court to stand trial as adult, defendant was convicted in the Circuit Court, City of Norfolk, Lydia Calvert Taylor, J., of capital murder and five other related felonies, all of which were committed when he was 16 years old. Automatic review of his death sentence was consolidated with appeal of right from his capital murder conviction, and his appeal from remaining convictions was certified from the Court of Appeals, and consolidated with capital murder appeal. The Supreme Court, Whiting, Senior Justice, held that: (1) defendant's statements to police were product of his free will, made after knowing, voluntary, and intelligent waiver of his *Miranda* rights; (2) trial court properly declined to strike three prospective jurors for cause; (3) nine-month delay in circuit court's review of transfer order was procedural error, but did not deny defendant due process; (4) defendant's speedy trial rights were not violated; (5) Commonwealth was properly permitted to reopen its case after resting; (6) evidence was sufficient to corroborate defendant's confession; (7) imposition of death penalty upon 16-year-old juvenile is not cruel and unusual punishment; (8) no error arose from testimony of court-appointed psychologist; and (9) death penalty was not excessive and disproportionate punishment.

Affirmed.

Hassell, J., issued opinion concurring in part and dissenting in part.

1. Criminal Law ⇐1213.8(8)

The death penalty does not constitute cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

2. Criminal Law ⇐1208.1(5)

Imposition of the death penalty based on "future dangerousness" is not unconstitutional on the ground that the use of a prior unadjudicated factor is permitted without any requirement that the conduct be established by any standard of proof.

3. Homicide ⇐311, 351

The statute and the court's instructions in conformity thereto which permit imposition of the death penalty based on "future dangerousness" are not unconstitutional on the ground that they are "incomplete and vague" and do not provide "meaning and guidance." Code 1950, § 19.2-264.

4. Double Jeopardy ⇐30

Allowing introduction of evidence of capital murder defendant's convictions for other crimes in sentencing phase to establish future dangerousness did not violate double jeopardy clause of Fifth Amendment. U.S.C.A. Const.Amend. 5.

5. Criminal Law ⇐1134(2)

The Supreme Court's method of reviewing the proportionality of a death sentence by considering the records only of those murder cases in which sentences of death were imposed and not of those murder cases in which lesser sentences were imposed is valid.

6. Criminal Law ⇐1115(1)

Capital murder defendant failed to show that trial court did not "order appropriate relief" when it failed to require Commonwealth to produce "exculpatory statements, evidence or admissions," and to ensure that no such evidence existed, or that it be provided to defendant, where he did not state in what respects court failed to provide such

relief or how
record showe
exculpatory e
knowledge, w

7. Criminal I

Sixteen-y
dant's statem
his free will,
and intelliger
despite alleg
mother's req
dant was full
of which he
previous arr
failed to und
fect of waive
four times c
period, these
contacts sett
him to revie
ing two inter
thirty-eight
rupted peri
hour and tv
Amend. 5.

8. Criminal

Police i
nile without
did not v
U.S.C.A. C

9. Crimina

Allege
by 16-year
nile was ir
of his state

10. Crimir

Recor
murder de
present ev
trial judge
issue and
venue; jur
that his or
ule hearin
although
three wee
indicating
selected,
fact, defe
other info

Courtroom until the jury gets out.

THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the

hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

MR. TUCK: Your Honor, we would note our objections based on the Sixth, Eighth and Fourteenth Amendments based on the grounds that I have already stated. We would also, it's my understanding that the Commonwealth will be playing the tapes. If the Court would, and I believe the Commonwealth would agree, we do have copies of the transcripts of these tapes. We were, they were never in the Commonwealth Attorney's file and they were not provided to us under discovery, the tapes themselves, and we would object to the tapes being played before the jury because we did not receive them and based on Brady I believe we are required to receive them and we would ask the Court not to allow them into evidence.

THE COURT: All right, sir. What I will do, Mr. Tuck, is allow you time to review the transcript.

MR. TUCK: Your Honor, the transcripts is one thing, but the voice inflections as far as on the tape they may have been exculpatory, they may be exculpatory, I don't know. The Commonwealth I do not believe ever had these in his possession, but as the

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 5th day of June, 1998.

Benjamin Lee Lilly, Appellant,

against Record Nos. 972385 and 972386
Circuit Court No. 13636

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 17th day of April, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amendment 6.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amendment 14, § 1.

IN VIRGINIA:

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

COMMONWEALTH OF VIRGINIA Plaintiff	)	
v	)	Motion In Limine
BENJAMIN LILLY Defendant	)	

Comes Now the Defendant, Benjamin Lilly, by and through counsel, pursuant to the 6th, 8th, and 14th Amendments of the Constitution of the United States, and asks this Court for an order precluding the admission of the statements of Mark Lilly that were given to Investigator Gary Price of the Giles County Sheriff's office, should Mark Lilly be unavailable to testify, based on the following grounds;

1) Admission of said statements would violate the Defendant's sixth amendment, through the fourteenth amendment, right to cross-examine one of the alleged accomplishes about a purported confession. DOUGLAS v ALABAMA, 380 U.S. 415, 1964, BRUTON v UNITED STATES, 391 U.S. 123, 1968, CRUZ v NEW YORK, 481 U.S. 186, 1986.

2) Admission of said statement would violate the Defendant's 6th 8th and 14th amendment rights because the statements that Mark Lilly gave would not conform to any hearsay exception, namely against his penal interest, because they are not reliable due to

A. Thank you.

THE COURT: If you'll go with Mrs. Skidmore.

THE COURT: Your next witness, Mr. Schwab.

MR. SCHWAB: Your Honor, before we call our next witness, the Court has to rule on some prior motions.

THE COURT: All right, sir.

MR. SCHWAB: And I believe it would be a good time for the jury to take another break.

THE COURT: All right, sir. Mrs. Skidmore, lets adjourn for about twenty minutes.

BAILIFF WEAVER: Court is in recess for twenty minutes.

THE COURT: Before the Court is the defendant's motion in limine concerning statements made by Mark Lilly to certain investigators outside the presence of the defendant. If you want to restate your motion for the record, it has been filed I understand, but if you want to restate your motion for the record, as

well as your grounds and argument, Mr. Tuck.

MR. TUCK: Your Honor, we believe that the Commonwealth will be calling Mark Lilly to the stand. He may or may not take the Fifth Amendment because some of his statements might incriminate him. That question, if he does not take the stand, it is our understanding that the Commonwealth intends to simply introduce transcripts that conspired or, between police officers and statements made by Mark Lilly. We believe that it's, if that is done that that will violate the confrontation clause of the Sixth Amendment as guaranteed to all citizens through the Fourteenth Amendment of the United States Constitution. Ben Lilly has a right to look at his accusers in the face and the jury has the ability to look at his accusers in the face and see, and, and the jury has the ability to look at that person and see if they're telling the truth. Clearly, if that is done, these statements are entered, then he will not have the ability to confront his accusers. Your Honor, we will not have the ability to ask Mark Lilly why he says that the shooting took place ten to fifteen yards away and

Gary Barker said they took place point blank. I won't have anybody to cross-examine. Your Honor, he indicates in one of his statements that he had money in his pocket and he could have paid for the beer that was done and that he didn't need to rob it. But in the other statement that he gives to Officer Hamlin, he says, no, I don't have, I, we, were broke. Clearly, these statements have inconsistencies. They are self-serving as well. If you look at the motion that I filed with the Court, he indicates he was so drunk he doesn't remember. That it wasn't he, ah, that, ah, did anything wrong, it was Gary Barker and Ben Lilly doing things wrong throughout the course of this evening. He says he was so drunk he doesn't remember. At any key point, did you know that they were going to go in and rob it? No, it, or it was their decision. I had money to pay for it. Did you know, did you handle the guns that evening? No, and the Court's already seen evidence that the pistol was seventy-five feet down behind the car. It had to get there somewhere, Your Honor, and Gary Barker has already testified that he didn't take it down there, so this is

another inconsistency with Mark Lilly's statements. Mark Lilly is trying to put himself off as just a, a, being intoxicated and not doing anything wrong in this case whatsoever. That is not an acceptable, ah, exclusion for a, the confrontation clause. It has to be against his own penal interest and the statements that he has given put him far away from the crime. They do not talk about the fact that he did. What did he do in Montgomery County? Well, I had to get in the car because I was so drunk. I didn't want to get left behind. Not that I knew what was going on. Which is totally inconsistent with what Gary Barker's testimony has been, and, Your Honor, I won't have anybody to cross-examine and he has that right based on the Sixth Amendment and when he gets in that stand, we won't be able to cross-examine and that's why it's so important to our system for the, when the, a jury to look at that witness and be able to say, there's discrepancies in their testimony. I won't be able to ask Mark Lilly, did you possess this money clip? I won't be able to do that because I don't have the right to confront him. My client has been denied that right if

the Court rules against us. That's why it's so important. We're talking about a murder trial and we're talking about whether a man lives or dies. This is not a shoplifting case and I am asking this Court, I am imploring this Court allow us the right to confront the witness and if we don't have that right, then to keep the statements out. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. Let me ask you a question. What is your argument if Mr. Lilly, I'm talking about Mark Lilly, -

MR. TUCK: Yes, Your Honor.

THE COURT: If he is available, the Commonwealth calls him as a witness, he is sworn, he is seated in the witness chair, and then he takes the Fifth Amendment against self-incrimination. Where is your argument as to whether such circumstances make him unavailable?

MR. TUCK: According to Virginia case law and Federal case law, that would make him or deem him to be unavailable. However, Your Honor, we believe that, frankly, we believe that the Virginia State Supreme Court

is wrong. It ruled in it's evidence that this, the whole statement could come in. Not just the statements against their penal interest, but the whole statement. If you look at the way the Federal courts interpret their own rules of evidence and the way that they have interpreted the confrontation clause, they only are allowed to look at the statements that incriminate them and if they get up, because that's where the reliability is. If Mark Lilly would have gotten up and said, I did something wrong here, that portion of the statement can come in. I did something wrong, but that's not what, that's not what the Commonwealth I, we believe again, that's not why they're going to be offering it. They're going to want to be offering it for the truth of the matter that Ben Lilly did something wrong and when that is done, we're talking about how, how, anything I say, if I got up in my opening argument or in closing argument and say, Mark Lilly says it's thirty, ten yards, fifteen yards, that would be thirty to forty-five feet and Gary Barker says that it's, ah, ah, point blank range. Your Honor, I don't have anybody to cross-examine. Anything that I say

is not evidence. I don't have anybody, any way of pointing that out because there is no one on the stand for me to cross-examine.

THE COURT: Thank you, Mr. Tuck.

MR. JENKINS: Your Honor, could I just give the Court a couple of cases I think will be on -

THE COURT: Mr. Tuck may insofar as this motion is concerned.

MR. TUCK: Your Honor, I -

MR. JENKINS: Okay.

MR. TUCK: Omitted just for the record Douglas v. Alabama, -

THE COURT: And that has already been submitted and reviewed by the Court -

MR. TUCK: I believe that's correct. Brutan v. United States -

THE COURT: That has been submitted and reviewed by the Court.

MR. TUCK: I believe Crews v. New York. I also believe I had submitted to the Court two other cases. That was an Idaho v. Wright and just to

briefly discuss Idaho v. Wright, Your Honor, while we're talking about some of the case law, that case was, involves a rule in Idaho that said there is a general hearsay that if it's reliable, the Court can have, let it in. And the Supreme Court said that's not a well-founded reason. One of the defendants objected as to hearsay. That defendant is still incarcerated. The other defendant objected as to the Sixth Amendment right to confrontation. The Supreme Court overturned that person's conviction is my understanding.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any response to the defense's argument?

MR. SCHWAB: Well, Your Honor, assuming that Mark Lilly will be unavailable because he takes the Fifth Amendment, his Fifth Amendment rights and refuses to be compelled to testify on matters that may incriminate him. The Commonwealth's view of the law is that while the defendant has a Sixth Amendment right it has been consistently held that that right does not override everything else, including and mentioned

specifically in the Idaho v. Wright that it doesn't override and they have refused to say that it will override other exceptions in evidence. They, the rule essentially is that evidence primarily of co-defendants in this case, well, let me back up, the rule is, matters may come in the Court that would violate the Sixth Amendment Confrontation Right if there is, in their terms, a well-rooted basis for admission of hearsay and that was pointed out several times in the Idaho case because the Idaho case involved a statutory residual hearsay. That's what the case was about as the Court knows. That's what the argument was over and the Supreme Court of the United States in that case held that residual hearsay was not sufficient enough to be what they called a well-rooted exception to the hearsay rule. In this case, it has been held for years and years in this jurisdiction as well as others and as Mr. Tuck pointed out, it is admissible even under the Federal Rules of Evidence for statements against penal interest. We would submit to the Court that that is a well-rooted basis for admission of hearsay. The Virginia Rule is

that the whole statement can come in. The Court has seen in the Scaggs case and the Chandler case which discussed what part could come in and whether or not it was incriminating and what made it against a person's penal interest. It didn't have to be a full confession essentially as long as it put them in jeopardy of prosecution. That being the case, it would appear that if he is unavailable, there is an exception to the hearsay which would allow those statements in and that it would not violate his constitutional rights based on the current status of the law. As far as I can tell, the U. S. Supreme Court has never had the issue nor made a ruling on whether or not a state well-rooted basis for admission of statements by an unavailable declarant concerning their penal interest is or is not a well-rooted matter. Certainly they had something in mind when they used that term and those would, one would assume from the cases below, from the Virginia cases on that point that, in fact, that's what they were looking to and while the case the defense has cited concerning the Federal Rules of Evidence, it did mention the

confrontation clause and if I remember correctly, they ruled only that part of the statement could come in under the Federal Rules of hearsay. They did not make the Federal Rules of Evidence due process requirements upon all the states of the United States of America. Only in their Courts where their rules were they said that's the rule they will use and how they will allow the information in concerning that hearsay exception and the current state of the law is that it's admissible and one other thing I'd like to say, Judge, that I'm sorry that the law of this Commonwealth should be different for murderers than for shoplifters, but I believe it should be the same no matter what the case is and it should not be argued or ruled upon by the Court simply because it's a murder case rather than a shoplifting, you ignore the current state of the law.

THE COURT: All right, Mr. Schwab. Let me ask you the same question that I asked Mr. Tuck. What is your argument as to whether or not Mark Lilly is available if, in fact he's sworn, takes the witness stand and responds, ah, by taking the Fifth Amendment against

self-incrimination. What is your opinion as to whether or not in terms of Virginia president, precedent that he is available or unavailable?

MR. SCHWAB: I cannot point to anything in the two cases I provided you, but it is my understanding of the law that one of the ways, although it may have been in FRIEND, I believe, noted with a citation that if a person does take the Fifth Amendment and cannot be compelled to testify, then that person is unavailable, ah, for testimony.

THE COURT: All right, sir. Thank you. Mr. Tuck, you have the burden on this motion, so I'll let you -

MR. TUCK: Your Honor, actually I believe that you, I, while we're making the Motion in Limine, I believe the burden always remains on the Commonwealth.

THE COURT: Well, the burden is on the Commonwealth, but what I meant to say is you, you are making this motion.

MR. TUCK: Your Honor, one of the

points that the Commonwealth brought up is this declaration against penal interest. Where is this a self-serving statement? Look at the, we're here for a charge of capital murder, abduction, robbery. Look at the statements as to those events and it don't incriminate him. He says he goes along just because he was drunk and didn't want to be left behind. He really didn't know what he was doing. Look at the statements that he gave. Is that the same reliability that the Commonwealth that, that even the Virginia Supreme Court cases have said, there has to be some reliability here before we're going to let a hearsay statement in and trample over the defendant's rights and when you start looking at the, he made statements, he didn't, ah, he can't remember if he had any guns or not because he was too drunk. Ah, he gives, we know that at one point in time that he, he mentions that the fact that he didn't indicate he wanted to commit any robberies. That it was just they wanted to do it. He, he keeps pushing the blame away from himself and that's not a declaration against the penal interest. That's a self-serving

statement. Now, the Commonwealth may argue, well, just because he's drunk doesn't mean that he wouldn't be an accomplice, but if someone is unconscious or because he indicates that he was blacking out that might make, that might be a defense. Clearly, Your Honor, as I stated earlier, we believe that this would be a violation of his rights and this is an important right. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. We'll be in recess for about ten minutes to consider your arguments.

MR. JENKINS: Your Honor, you'll be back by yourself, is that correct, in considering it?

THE COURT: Yes, sir.

MR. JENKINS: I'm going to make a telephone call.

THE COURT: Without any coaching from the principals in this matter.

MR. JENKINS: Thank you, Judge.

MR. TUCK: Thank you.

BAILIFF WEAVER: Everyone rise.

Courtroom until the jury gets out.

THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: . Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the

hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 972385

BENJAMIN LEE LILLY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Max Jenkins
JENKINS & JENKINS
Post Office Box 886
Radford, VA 24141
(540) 639-9088

Christopher A. Tuck
ATTORNEY AT LAW
805 Triangle Street
Post Office Box 11422
Blacksburg, VA 24062
(540) 552-4567

Counsel for Appellant

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

TABLE OF CONTENTS

Page(s)

TABLE OF CASES/CITATIONS/AUTHORITIES PAGES

CODE OF VIRGINIA, AS AMENDED 1950

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Appellant received the death penalty in this Capital Murder case. He and two others, including his brother Mark Lilly, were charged with several crimes. The Appellant was charged with being the trigger man in the robbery and murder of Alexander DeFillipis.

Appellant's brother, Mark Lilly, who was brought in as a witness without being given immunity, refused to testify, asserting his 5th Amendment right. His statements to police would later be read to the jury. Moreover, Mark Lilly would later admit under oath that he had lied to police.

At trial, certain objections and exceptions were made by the defendant. The defendant alleged error from the selection of certain jurors; error in the display by the Commonwealth at counsel table a photograph of the victim in life; error by the Commonwealth's Attorney in his closing argument by pointing the murder weapon toward defense counsel and Appellant; the admission of two hearsay statements of Appellant's brother after the assertion of the brother's 5th Amendment rights.

The two statements made by Appellant's brother contained much more than a declaration against the interest of the brother. The statements introduced and approved by the Court contained statements by police officers that they in effect did not believe that Mark Lilly had killed DeFillipis, but that they believed in fact that Appellant was guilty of the murder. Obviously, this is an opinion as to the innocence or guilt of Appellant, Benjamin

Lee Lilly, and is not admissible.

STATEMENT OF FACTS

At the start of this trial, the Commonwealth displayed in full view of the jury a framed portrait of the victim in life. After the Court ruled that the Commonwealth should not have placed the photograph, a motion for mistrial was denied.

The evidence most favorable to the Commonwealth indicates that the Appellant, his brother Mark Lilly, and Gary Barker burglarized a home in Floyd County, Virginia and thereafter travelled to Radford, Virginia to the home of a friend, where personal property taken from the burglary was divided. All three men were drinking heavily. The Court would refuse an instruction on voluntary intoxication.

After travelling to several places within Montgomery County, Virginia, the automobile in which the three were travelling became disabled near a convenience store, Hethwood Express, in Blacksburg, Virginia.

The murder victim, Alexander DeFillipis, had driven a friend to the convenience store. The evidence indicates that while DeFillipis' friend was inside the store, the Appellant carjacked the vehicle and, along with Mark Lilly and Barker, took Alexander DeFillipis with them to a secluded spot in Montgomery County, Virginia where the three forced DeFillipis to disrobe. Shortly thereafter, DeFillipis was shot three times in the head, killing him instantly.

The three travelled from the scene of the murder to

Eggleston, Virginia and Pembroke, Virginia, where they robbed two stores. The three were apprehended after the robberies; Barker and Mark Lilly unsuccessfully attempted to flee from police.

A portion of the Commonwealth's evidence consisted of blood found on the back of Appellant's pants leg, which could not be determined to be of human origin. Appellant objected to the admission of a statement allegedly made by Appellant to Chief Whitset.

Appellant objected also to evidence being introduced regarding his refusal to participate in a paraffin test after he had been advised erroneously by investigating officers that participation was voluntary.

Objection was also made to the admittance of the medical report as evidence on the grounds that it was hearsay and that the medical examiner appeared in court and had testified to the jury concerning items in the report.

Objection was also made to one of the Commonwealth's chief witnesses, co-defendant Gary Barker, having read prior newspaper articles that the Court ordered witnesses not to read. (Barker was not present when this admonishment was given.)

The main evidence linking the Appellant to the crimes was co-defendant Gary Barker and two taped statements of co-defendant Mark Lilly, Appellant's brother. The Court ruled that Mark Lilly's assertion of his 5th Amendment rights resulted in his being unavailable. Objection was made to the taped statements in which Mark Lilly told an investigator, "we had nothing to do with

the shooting." He further stated that "we" meant Mark Lilly and Gary Barker. The statement of Mark Lilly contained statements of the police (giving opinions of defendant's guilt), and statements that Mark Lilly and Barker thought the Appellant was going to let DeFillipis go. The statement of Mark Lilly named Appellant as the trigger man, placing Appellant as the person facing the death penalty.

The Court also refused to give an instruction on voluntary intoxication and an instruction stating that if the jury had a reasonable doubt as to punishment (life or death), they had to impose the lower grade of life imprisonment.

Gary Barker's testimony also implicated Appellant as the trigger man.

During closing arguments, the Commonwealth's Attorney pointed the murder weapon in the direction of defense counsel and Appellant. A mistrial was requested, but again refused.

IN THE SUPREME COURT OF VIRGINIA

BENJAMIN LEE LILLY,
Appellant

v

Record No. 972386

COMMONWEALTH OF VIRGINIA,
Appellee

AMENDED ASSIGNMENTS OF ERROR AND DESIGNATION OF RECORD

Now comes the Appellant and pursuant to Rule 5:22 of the Rules of the Supreme Court of Virginia and assigns as error the following:

ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to seat Ms. Huffman as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Page 118-153.

2. The trial court erred when it refused to seat Janet Matheson on the ground that she indicated that she probably could not impose the death penalty in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Page 330.

3. The trial court erred when it refused to seat Kristine Mitchell when she indicated that she could follow the law and impose the death penalty. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Pages 390-418.

4. The trial court erred when it refused to allow defendant's Counsel to explore questions outside of the approved list violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Page 501-526.

5. The trial court erred when it sat James Rakes as a juror when he indicated he would believe Chief Whitsett more than other witness because he knew Chief Whitsett, in violation of the Defendant's rights as guaranteed by the fifth, sixth,

and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Pages 576-605.

6. The trial court erred when it sat Samuel Shumate as a potential juror when Mr. Shumate stated that he was a second cousin to an investigator, Ron Hamlin, who was involved in the case and whom the defense stated that they intended to attack, and Shumate considered Mr. Hamlin to be a "real close friend"; said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Pages 606-626.

7. The trial court erred when it refused to seat Leona H. Wallace as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United Stated Constitution. Transcript Volume 2A, Pages 645-656.

8. The trial court erred when it refused to seat Ollie M. Jones when Ms. Jones clearly stated that she could follow the law. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2B, Pages 936-952.

9. The trial court erred when it failed to seat Ms. Mumaw in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth amendments to the United States Constitution. Transcript Volume 2B, Page 957-964.

10. The trial court erred when the venue of the case was not changed in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 212-215, Transcript Volume 2, Page 198, and Transcript Volume 2B, Pages 783-784 and 1011-1013.

11. The trial court erred when it refused to allow the defense to educate the jury during voir dire in regard to the option life in prison without the possibility of parole in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 138-140 and 273-274.

12. The trial court erred when it denied the Defendant's request for a Bill of Particulars when the information that was being sought was going to be used to challenge the constitutionality of the death penalty. That said error was a violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States

Constitution. Transcript Volume 1, Pages 207-209.

13. The trial court erred when it admitted graphic photographs of the victim in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 220-222.

14. The trial court erred when it refused the Defendant's request to introduce black and white photographs of the victim and crime scene instead of color photographs, which were more inflammatory and violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 220-232. Transcript Volume 5 pages 1394-1395.

15. The trial court erred when it allowed the jury to hear evidence of the Defendant's refusal to take a paraffin test, (gun residue test), when he was advised by the Government that he had a right to refuse such a test and that it was voluntary. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 240-264 and Transcript Volume 1, Page 14-18, 249, 250, 251, 252.

16. The trial court erred by allowing a juror who had read a newspaper article about Mr. Lilly's past to remain in the jury panel in violation of the Defendant's rights as guaranteed the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 17-18.

17. The trial court erred in the admission of evidence of a co-defendant's statement whom the court ruled was not available and that the statements were admissible as statements against penal interest. Said error violated the Defendant's rights as guaranteed by the confrontation clause, the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 22-23 and Transcript Volume 4, Pages 773-777, statement made between pages 813-814, 847-848 and 866-867, Transcript Volume 5 pages 1303, 1587-1598, 1610-1620 and 1652-1653.

18. The trial court erred when it determined that a co-defendant's statement met the criteria set forth in Chandler v Commonwealth, 249 Va 270, 455 S.E.2d 219 (1995) and the requirements of the confrontation clause. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 22-23; Transcript Volume 4, Pages 773-790, 847-848, and 866-867; Transcript

Volume 5, Pages 1303, 1587-1598, 1610-1620, and 1652-1653.

19. The trial court erred when it refused to grant a mistrial after the Commonwealth's Attorney displayed before the jury a large photograph of the deceased victim, intending to incite or inflame the jury, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 54-56 and 93-94.

20. The trial court erred in the admission of the video tape depicting the victim and the crime scene, in violation the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Page 302.

21. The trial court erred when it allowed, in addition to the testimony of Doctor Oxley, his written report as evidence before the jury, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 545-546, and 561.

22. The trial court erred in allowing evidence that there was blood on the clothing of Benjamin Lee Lilly, which blood could not be determined to be human or animal, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 551-560, and 577.

23. The trial court erred when it refused to declare a mistrial after a co-defendant, (Barker) read an article on the newspaper concerning the trial despite the fact that Barker was sequestered, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Page 29-40, 674-675.

24. The trial court erred when it allowed a police officer (Officer Whitsett) to testify concerning statements allegedly made by the defendant before he was Mirandized; in particular, asking the Defendant: "what does a murderer look like?", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 149-185, 268-273. Transcript Volume 4, Pages 758, 864. Transcript Volume 5, Pages 1541-1542.

25. The trial court erred when it allowed statements allegedly made by the Defendant to Chief Whitsett when the officer said he "thought he heard the statement", violating the Defendant's rights as guaranteed by the fifth, sixth and

fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 154-185, 268-273.

26. The trial court erred when it did not allow statements of a co-defendant and one of the Commonwealth's primary witnesses to be admitted, admitting that he had engaged in certain conduct that one could infer that he had the necessary intent to kill the victim, violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 4, Pages 888-892, 904.

27. The trial court erred when it failed to give an instruction on intoxication reducing the Capital Murder offense to a lower crime, in violation of the Defendant's rights as guaranteed by the fifth, sixth, eight and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Pages 1193-1196.

28. The trial court erred when it failed to grant a mistrial after the Commonwealth's Attorney during his closing argument pointed the murder weapon in the direction of the Defendant and his counsel; and when the defense objected to the Court, the Court in front of the jury called the Defendant's objection ridiculous, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Pages 1279-1292, 1310-1311, and 1317-1321.

29. The trial court erred at the guilt phase in refusing to give an Instruction that told the jury if they had a reasonable doubt as to the grade of punishment, to impose the lower grade, (life), violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1486.

30. The trial court erred when it refused an Instruction telling the jury that they could consider at the penalty stage residual remaining doubt that the defendant committed the offense, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1492-1493.

31. The trial court erred when the Commonwealth at the penalty stage was not ordered to give a Bill of Particulars of the aggravating factors that the Commonwealth would use, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1498.

32. The trial court erred when they allowed the Commonwealth to

introduce a felony conviction for purpose of showing that the defendant was a convicted felon when the defendant agreed to stipulate that the defendant had been convicted of a felony, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 282.

33. The trial court erred when it failed to hold Virginia's death penalty statute unconstitutional violating the Defendant's rights as guaranteed by the fifth, sixth, eighth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 266-268.

34. The trial court erred when it allowed the Commonwealth to introduce the taped statements of Mark Lilly when the Commonwealth only provided a written transcript of the statement prior to trial, violating the Court's Discovery Order and in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 4, Pages 789-793, and 811.

QUESTIONS PRESENTED AND ARGUMENT IN SUPPORT

1. Did the trial court err when it refused to seat Ms. Huffman as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.510-545)

2. Did the trial court err when it refused to seat Janet Matheson on the ground that she indicated that she probably could not impose the death penalty in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A. 716-722)

3. Did the trial court err when it refused to seat Kristina Mitchell when she indicated that she could follow the law and impose the death penalty. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A 782-812)

7. Did the trial court err when it refused to seat Leona H. Wallace as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United Stated Constitution? (A.1039-1050)

8. Did the trial court err when it refused to seat Ollie M. Jones when Ms. Jones clearly stated that she could follow the law. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.1335-1351)

9. Did the trial court err when it failed to seat Ms. Mumaw in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth amendments to the United States Constitution? (A.1356-1363)

During the voir dire process the trial court struck several jurors for cause when they indicated opposition to the death penalty. The trial court, especially in the cases of Ms. Huffman, Ms. Mitchell and Ms. Jones, abused its discretion and struck the jurors for cause.

Beginning with Connie Huffman, the trial court struck for cause because of a concern about the juror's ability to apply the

death penalty. Ms. Huffman stated to the trial court that she could impose a death penalty and that she would follow the trial court's instruction and follow the law. During her entire questioning by the trial court and counsel regarding her ability to perform her duty, Ms. Huffman stated that while she didn't believe in the death penalty, if she had to be on the case "I would be fair in what my decision would be." (A.514) Moreover, when asked by the trial court if her belief or opinion would impair her from imposing the death penalty, Ms. Huffman stated that "I don't think that would be any problem." Ibid.

In regard to Janet Matheson, Appellant concedes that Ms. Matheson did express an inability to impose the death penalty due to her beliefs, however the Appellant maintains that he is entitled to a jury of his peers and that by striking Ms. Matheson the trial court denied the defendant that right.

The third juror struck was Kristina Mitchell. Ms. Mitchell stated to the trial court that she was struggling with her own beliefs regarding the death penalty, however she indicated that she could follow the law and impose the death penalty.(A.786) Over the entire questioning Ms. Mitchell agreed to follow the trial court's instruction which included possible imposition of the death penalty. Specifically, when asked by the trial court whether her beliefs would impair her responsibility, Ms. Mitchell stated "No," that they would not effect her responsibility. (A.810)

Regarding Ms. Wallace the Appellant concedes that Ms.

Wallace expressed a reluctance to set aside her beliefs, but she indicated that she would be able to follow the law.

Ms. Jones indicated that she had spoken to her minister and felt that she could serve as juror. (A.1340) She did indicate it would be difficult to sit in judgement of another person and sentence someone to death, but would the trial court desire someone who took that duty lightly? When viewing the entire voir dire it is clear that Ms. Jones understood her duty as a juror and was capable of carrying it out.

The Appellant concedes that Ms. Mumaw expressed an opinion that she could not impose the death penalty. However, the Appellant argues that he is entitled to a jury of his peers and that by excluding Ms. Mumaw the trial court denied the defendant that right as provided by the U.S. constitution.

In determining whether the trial court abused its discretion this Court has stated that several factors must be considered on appellate review. First, the juror's views would have to substantially impair or prevent their performance of their duties as a juror; second, the trial court's decision will not be disturbed unless there is manifest error because the trial court is in a position to view and hear the juror; and third, that this Court will review the entire voir dire, not a single question. Barnabei v Commonwealth, 252 Va. 161, 173, 477 S.E.2d 270 (1996).

When applying the law to the matter at hand the Appellant maintains that trial court abused its discretion, especially when examining Ms. Huffman, Ms. Mitchell and Ms. Jones. The Appellant

maintains such abuse in discretion rose to the point of being a manifest error. Ms. Huffman on several occasions maintained that she could be fair and set aside her own beliefs and apply the law. However, the trial court ignored Ms. Huffman's responses and focused in on her belief about the death penalty. The law requires that the belief must substantially affect the juror's ability to perform their duty, but Ms. Huffman maintained throughout her voir dire that she could fulfill that duty. Ms. Jones made the same commitment to serve responsibly as a juror.

4. **Did the trial court err when it refused to allow defendant's Counsel to explore questions outside of the approved list violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.916-920)**

The Appellant maintains that when the trial court banned the defense from deviating from the approved list of questions, it deprived the Appellant from asking relevant questions of the potential jurors as allowed for by Buchanan v Commonwealth, 238 Va. 389, 384 S.E.2d 757, (1989). Thereby the trial court abused its discretion and violated Virginia code §8.01-358.

5. **Did the trial court err when it sat James Rakes as a juror when he indicated he would believe Chief Whitset more than other witness because he knew Chief Whitset, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.970-999)**

6. **Did the trial court err when it sat Samuel Shumate as a potential juror when Mr. Shumate stated that he was a second cousin to an investigator, Ron Hamlin, who was involved in the case and whom the defense stated that they intended to attack, and Shumate considered Mr. Hamlin to be a "real close friend"; said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.1000-1020)**

On two occasions the trial court failed to strike jurors for cause when it was clear that neither James Rakes nor Samuel Shumate were impartial as required by the United States Constitution, the sixth and eighth through the fourteenth Amendments.

On Page A.988 of the Joint Appendix Mr. Rakes gives a clear and honest answer that he would believe Chief Whitset more than other witnesses because of their relationship. In addition, when asked whether he would give Whitset more credibility than other witnesses Rakes states "(i)t's a difficult question, but I think you would tend to you know, if you knew something about someone or knew something he could do." (A.988) When the trial court questioned Rakes about his ability to view all witnesses with the same weight, Rakes responded "No, your Honor, I think what I meant to say was I'd probably start off at a different point because you do have some familiarity, some knowledge and some past about that person, maybe you would start with a different feeling when you first began, but I don't know that would carry on through all the testimony." (A.997) Clearly, by all of Rakes' statements he felt that he would give Whitset more credibility at the start of his testimony then other witnesses. Whitset was also an important witness in the case because of alleged statements that Lilly may have given to him. Whitset's creditability was brought directly into question as to what he believed he heard Lilly say. The trial court was aware of Whitset's importance, because the trial court had heard a motion to suppress the

statement months before. Defense counsel was forced to use one its preemptory challenges to strike Rakes.

In Mr. Shumate's case, Shumate testified that he was related to Investigator Hamlin and that Shumate consider Hamlin to be a "real good friend." (A.1016) Moreover, the defense informed the trial court that they intended to call Hamlin and criticize some of his work on this case. Defense counsel did just as it had proffered and attacked the manner in which Hamlin had handled pieces of evidence. Hamlin was also one the investigators who questioned Mark Lilly.

In objecting to Rakes and Shumate, defense counsel cited Breeden v Commonwealth, 217 Va. 297, 227 S.E.2d 734 (1976), which holds that a defendant has a constitutional right to a fair and impartial jury and that all that is needed to strike a juror is reasonable doubt. (See also Wright v. Commonwealth, 73 Va. (32 Gratt.) 941 (1879). In applying the law to the matter at hand it becomes clear that reasonable doubt was present regarding both Rakes' and Shumate's impartiality due to their relationships to prospective witnesses, thereby violating Appellant's constitutional rights to a fair and impartial jury.

10. **Did the trial court err when the venue of the case was not changed in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.305-308, 590-591, 1181-1182, 1410-1412)**

The defense filed several affidavits to show that there was community prejudice towards the Lilly. Radio, television and newspaper articles recite inflammatory, hostile and prejudicial

accounts of Lilly and the crime for which he was charged. These reports also included conclusory labels about Lilly which were prejudicial in nature, such as the Roanoke Times editorial calling Lilly a "thug" and asking why the he wasn't incarcerated. In addition the newspapers reported sympathetic information about the victim. In a Virginia capital case the trier of fact cannot receive a victim impact statement before the sentencing phase of the trial which describes the victim and the effect his death had on his survivors as well as the Community.

Moreover, the publication of Lilly's prior record was highly prejudicial. Numerous articles referred to Lilly's prior criminal record. Such publication created an opportunity for the jury's verdict to rest on impermissible grounds. The widespread publicity concerning the nature of the alleged offenses and Lilly's alleged involvement presented a reasonable likelihood that Lilly would be denied his constitutional right to a fair trial and impartial jury. Therefore a change of venue under Va. Code Ann. §19.2-251 was necessary to protect Appellant's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

11. Did the trial court err when it refused to allow the defense to educate the jury during voir dire in regard to the option of life in prison without the possibility of parole in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.231-233, 366-367)

On two separate occasions, defense attempted to educate the jurors before the sentencing phase in regard to the fact that

parole has been abolished for those in Virginia who are convicted under the capital murder statute. Specifically, counsel proffered the following question to the trial court; "Would you be more likely to objectively consider life in prison if you knew that a sentence of life in prison means that the person would not ever become eligible for parole?"

Appellant maintains that by refusal to allow defense counsel to educate the jury during voir dire prohibited him from obtaining a fair and impartial jury. The United States Supreme Court held in Simmons v. South Carolina, 114 S.Ct. 2187 (1994) that the defendant had a right to educate the jurors that life in prison meant life in prison. However, in order to properly voir dire the jurors, the Appellant needed the ability to inform the potential jurors that if convicted Lilly would not be released until his death. Appellant maintains that this was a violation of his rights as guaranteed by the fifth and sixth through the fourteenth Amendments of the United States Constitution.

12. Did the trial court err when it denied the Defendant's request for a Bill of Particulars when the information that was being sought was going to be used to challenge the constitutionality of the death penalty. That said error was a violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.300-302)

31. Did the trial court err when the Commonwealth at the penalty stage was not ordered to give a Bill of Particulars of the aggravating factors that the Commonwealth would use, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2982-2983)

In order to ensure effective assistance of counsel as

guaranteed by the Sixth Amendment to the Constitution of the United States, Appellant in this case attempted to determine the appropriateness of a motion to dismiss the capital indictment upon which this prosecution was based were unconstitutional as applied in this action.

Appellant argued that the statute may be unconstitutional as applied in this case because, inter alia, (1) the evidence for the Commonwealth may, as a matter of law, have been obtained unconstitutionally or be insufficient to establish the elements of capital murder, or (2) the Commonwealth may seek to apply one or more of the aggravation factors necessary to render defendant eligible for a sentence of death in an unconstitutional manner or the evidence may, as a matter of law, be insufficient to support a sentence of death.

Notice and opportunity to be heard are the cornerstones of due process of law. Lankford v Idaho, 500 U.S. 110, 127 (1991); Goss v Lopez, 419 U.S. 565, 579 (1975). Further, due process requires that a defendant be given notice and opportunity to defend against the Commonwealth's case for death. Simmons v South Carolina, 114 S.Ct. 2187 (1994); Lankford v Idaho, 500 U.S. 110 (1991); Gardner v Florida, 430 U.S. 349 (1977). In addition, the unique nature of the death penalty requires additional protection during pretrial, guilt and sentencing stages. Lockett v Ohio, 438 U.S. 586, 604 (1976). The Virginia Supreme Court has held that the indictment gives notice of the offense. Beard v Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994); Mickens v Commonwealth, 247

Va. 395, 442 S.E.2d 678 (1994). The indictment, however, gives no notice of aggravating factors, including the constitutionally required narrowing construction if the government will rely on the "vileness" factor.

Appellant, in demanding that the Commonwealth identify its evidence, did not seek discovery. Copies of statements of the Commonwealth's witnesses and scientific evidence, for example, were not sought in the motion for the Bill of Particulars. Rather, Appellant sought and was entitled to have the Commonwealth identify its evidence so that proper pretrial challenges to the application of Virginia's capital murder statute in this case could have been made where appropriate. The Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the law of Virginia both authorize that the bill of particulars be granted when challenging the constitutionality of a statute.

Va. Code Ann. §19.2-266.2 requires the defense to raise a motion to dismiss an indictment or any count thereof, on the ground that a statute upon which it is based is unconstitutional, by written motion or objection prior to trial, which is what counsel did in this matter. Additionally, defense motions for suppression of evidence on the grounds such evidence was obtained in violation of the provisions of the Constitution of the United States or the Constitution of Virginia proscribing illegal searches and seizures and protecting rights against self-incrimination must be raised by written motion or objection prior

to trial.

The statute further requires that "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230." The appellant requested a bill of particulars in order to move for dismissal of the capital indictment or to prohibit imposition of the death penalty on the grounds that Va. Code Ann. §18.2-231 and Va. Code Ann. §19.2-264 were unconstitutional as applied in this case. However the trial court denied Appellant's motion.

A motion to dismiss an indictment on the grounds that the underlying statute is unconstitutional on its face requires no such information; for example, a bill of particulars is not sought in aid of defendant's motion to prohibit imposition of the death penalty alleging systemic deficiencies in Virginia death penalty statutes. The indictment and the underlying statute are sufficient grounds to make this motion.

The Appellant argued in contrast, Va. Code Ann. §19.2-266-2 requires the Commonwealth to provide such in order for the defense to make a timely motion to dismiss the capital indictment on the grounds that the underlying statutes are unconstitutional as applied to this defendant, in that the time, place, manner, and means of the crime are constitutionally insufficient and cannot support either the capital indictment or the imposition of the death penalty.

The motion for a bill of particulars requests identification of all evidence upon which the Commonwealth intends to rely in seeking a capital murder conviction or imposition of the death penalty. Such identification is essential to enable the defendant to determine whether to move for suppression of the evidence on the grounds that it was obtained in contravention of the constitution.

The Supreme Court of Virginia has held that "[t]here is no general right to discovery in a criminal case, even where a capital offense is charged." Strickler v Commonwealth, 241 Va. 482, 490, 404 S.E.2d 227, 233 (1991). However, recognizing that the line between general discovery and a bill of particulars is difficult to draw, the General Assembly has determined that because notice of evidence to support a defendant's pre-trial motions under §19.2-266.2 is compelled by the Sixth, Eighth and Fourteenth Amendments, the trial court is required by that statute to direct the Commonwealth to file a bill of particulars upon motion of the defendant.

It has been repeatedly held by the Virginia Supreme Court that it is the duty of the trial court to compel the attorney for the Commonwealth, when demanded by the accused, to file such bill of particulars as will apprise the defendant of the cause and nature of his accusation. Riner v Commonwealth, 145 Va. 901, 134 S.E. 542 (1926). In a capital case, the cause and nature of the allegation include those factors the Commonwealth must prove in order to render a defendant eligible for a sentence of death. The

United States Supreme Court also has noted that, in order for the requirements of due process to be met and for the adversarial system to work properly, counsel must be given "a meaningful opportunity to present a complete defense," Crane v Kentucky, 476 U.S. 683, 690 (1986), and that a capital defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." Gardner v Florida, 430 U.S. 349, 362 (1977). This requires notice of all such facts that will influence the sentencing decision. Simmons v South Carolina, 114 S.Ct. 2187 (1994) (due process requires that a defendant be permitted to rebut the future dangerousness aggravating factor with evidence of parole ineligibility if sentenced to life in prison); Lankford v Idaho, 500 U.S. 110, 126 (1991) (lack of notice that the death sentence may be imposed by the trial judge, even though the prosecutor was not requesting the death penalty, created an "impermissible risk" that the adversarial system would not function properly).

In Virginia, the Commonwealth must prove one of two aggravating factors to support the death penalty. The jury may impose a death sentence only if it finds that the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery (the "vileness" factor), or that the defendant would commit criminal acts of violence in the future that would constitute a continuing serious threat to society (the "future dangerousness" factor). Va. Code Ann. §19.2-

264.4 (1990).

The Virginia "vileness factor" requires narrowing constructions to further distinguish its application because it uses broad, vague terms that could apply to any murder. Maynard v Cartwright, 486 U.S. 356 (1988). The narrowing construction becomes, in effect, a limitation and clarification of the offense charged. The Supreme Court has flatly held that the language used in Georgia's "vileness" factor was constitutionally deficient.

Similarly, Virginia's "future dangerousness" aggravating factor is comprised of broad, vague terms that could apply to any murder. Maynard, supra. No limitation nor clarification of the overly broad offense described is provided to sentencers. Therefore, a constitutionally sufficient narrowing construction of the "future dangerousness" aggravator is also required. Ibid.

Furthermore, not all narrowing constructions are sufficient to meet constitutional requirements. Shell v Mississippi, 498 U.S. 1 (1990).

The appellant maintains Va. Code Ann. §19.2-266.2 required the trial court to order the Commonwealth to file a bill of particulars for this defendant. Further, for a capital defendant to have constitutionally adequate notice and opportunity to defend himself, it was essential that the Commonwealth provide the Appellant with both the aggravating factors and the narrowing constructions thereof upon which the Commonwealth intends to seek the death penalty. Finally, Va. Code Ann. §19.2-230 permits the trial court judge to order the Commonwealth to file a bill of

particulars at his discretion; by failing to order a bill of particulars the trial court abused its discretion.

13. Did the trial court err when it admitted graphic photographs of the victim in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.313-315)

14. Did the trial court err when it refused the Defendant's request to introduce black and white photographs of the victim and crime scene instead of color photographs, which were more inflammatory and violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.313-328, 2878-2879)

20. Did the trial court err in the admission of the video tape depicting the victim and the crime scene, in violation the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1741)

22. Did the trial court err in allowing evidence that there was blood on the clothing of Benjamin Lee Lilly, which blood could not be determined to be human or animal, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1990-1999, 2016)

32. Did the trial court err when they allowed the Commonwealth to introduce a felony conviction for purpose of showing that the defendant was a convicted felon when the defendant agreed to stipulate that the defendant had been convicted of a felony, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.375)

On several occasions the trial court admitted evidence that was more prejudicial than probative.

During pretrial motions, Appellant moved to exclude color photographs and videotape of the victim after the murder. While some of the photographs may have been necessary to prove elements of the crime, the prejudicial effect would have been diminished if the trial court had required the Commonwealth to introduce

black and white photographs. Lilly argues that the trial court, in failing to require black and white photographs and videotape, abused its discretion.

In addition, the trial court abused its discretion when it allowed evidence that blood was found on the back of Lilly's pants when there could be no determination as to the type of blood (whether it was human or animal blood) or as to the age of the blood. Moreover, the three co-defendants had killed a goose earlier in the day, the carcass and blood of which were found in the trunk of Benjamin Lilly's car.

Finally, the trial court refused to allow the defendant to stipulate that he was a convicted felon, instead allowing the prosecution to admit a prior malicious wounding conviction.

Coe v Commonwealth, 231 Va. 83, 340 S.E. 820 (1986) held that when relevant evidence is offered which may be inflammatory and which may have a tendency to prejudice jurors against the defendant, its relevancy must be weighed against tendency of proffered evidence to produce passion and prejudice out of proportion to its probative value.

In examining the issues at hand Lilly maintains that the inflammatory nature of the photographs and videotape, the testimony regarding the unidentifiable blood on Lilly's pants, and the fact that the trial court would not allow Lilly to stipulate that he was a convicted felon outweighs their probative value. In particular, there was absolutely no reason, except for inflaming the jury, that the Commonwealth needed to introduce

Lilly's felony conviction when he agreed to stipulate this element.

15. Did the trial court err when it allowed the jury to hear evidence of the Defendant's refusal to take a paraffin test, (gun residue test), when he was advised by the Government that he had a right to refuse such a test and that it was voluntary. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.333-357, 1437-1441, 1688-1691)

The defendant was erroneously advised by the government that such a test was voluntary on his part. Based on this statement, he refused this test.

His refusal was used as evidence against him. It is completely unfair for the defendant to be advised erroneously and then the government to get the benefit of his refusal. This could create all types of abuse in the future on the part of police. Clearly the admission of this testimony was in error. It has been held that silence cannot be used against a defendant. Escobedo v. Illinois, 378 U.S. 478 (1964). Certainly an erroneous statement by the government causing the defendant to engage in a course of conduct should also not be used against the defendant.

16. Did the trial court err by allowing a juror who had read a newspaper article about Mr. Lilly's past to remain in the jury panel in violation of the Defendant's rights as guaranteed the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1438-1441)

A juror who has knowledge of specific acts of misconduct not related to the crime should not be seated. As a matter of Constitutional guarantee, the accused is entitled to a fair trial. Cases in Virginia have held that if certain preconceived

opinions of jurors (for example, stemming from newspaper articles) cannot be removed by the trial judge, those jurors should not be seated.

However, in this case a juror learned of other specific acts not related to the murder charge from a newspaper article (A.36), which told of Appellant being on parole.

It is submitted that this juror, having knowledge of Appellant's prior criminal record, should have been struck for cause.

17. Did the trial court err in the admission of evidence of a co-defendant's statement whom the court ruled was not available and that the statements were admissible as statements against penal interest. Said error violated the Defendant's rights as guaranteed by the confrontation clause, the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1445-1446, 2212-2225, 2253-2282, 2318-2332, 2350-2359, 2787, 3071-3082, 3094-3117, 3136-3137)

The Appellant is mindful of Chandler v. Commonwealth, 249 Va. 270 (1995), which held that Chandler's girlfriend's statements against her penal interest were admissible. The girlfriend's statement described riding in an automobile with Chandler and others to obtain a gun, and Chandler's discussion about "going in, robbing the store and leaving." The girlfriend's statement also contained other statements further inculpating Chandler. The Chandler case appears to be the first case in Virginia that allowed the confession or statement of a co-defendant that was not exculpatory to the accused. It is submitted that Chandler and subsequent cases created a "new"

exception to the hearsay rule and violates the defendant's 6th Amendment rights to confront and cross-examine.

The rule in Chandler has been upheld in subsequent cases, the most recent of which was Randolph v Commonwealth, 24 Va. App. 345 (1997). This case involved the admission of a co-defendant's statement during a joint trial with the defendant. This case also held that the confrontation clause was not violated by the admission of such a statement. This statement was allowed although made after the conspiracy had ended.

(From a reading of Chandler or Randolph, there is nothing to indicate that any statement of a police officer was admissible, nor were the opinions of a police officer admissible. The entire statement admitted in Chandler at page 278 concerned the factual conduct of Chandler's girlfriend; about Chandler robbing the store and about her acting as the driver of an automobile in the commission of this crime.

This court held that the girlfriend's statement qualifies as admissible hearsay and quoted Ellison v Commonwealth, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978), (citing Hines v Commonwealth, 136 Va. 728, 117 S.E. 843, (1923).

In Ellison, it was the defendant, Ellison, (not the Commonwealth), who sought to have a statement admitted given by Joseph Brown indicating that he was the perpetrator of a crime. This statement was exculpatory and aided Ellison.

In Hines, (also quoted in the Chandler case) a rule (that at the time was beneficial to the defendant), was adopted that was

"out of line with the current of authority" and held that the evidence of an extra judicial confession exculpatory of the accused and made by a dead or otherwise unavailable witness, is admissible as an exception to the hearsay rule. (Please note in Hines that this was again the defendant who sought introduction of a hearsay statement). The Court held that the evidence of an extra judicial confession exculpatory of the accused was admissible.

The same rule was later affirmed in Newberry v Commonwealth, 191 Va 445, 61 S.E.2d 318 (1950), (requiring the statement to be exculpatory to the defendant), but none of these cases has ever allowed, prior to the Chandler case, these statements to be used upon the request of the Commonwealth. In these cases, the person who made the statement was not present in court. It is submitted that there has not been a well established hearsay rule in the State of Virginia that allowed these statements to be used by the Commonwealth. The Commonwealth had such statements exculpatory to the accused, admitted against the government, because the Commonwealth does not have the right to confrontation. The rule established in Chandler creates an exception to the hearsay rule, which it is submitted cannot be used against the defendant, because it bars his right to confront that witness.

It is further submitted that in none of these cases were the opinions of a police officer, expressing his belief in the defendant's guilt, allowed to be entered as evidence.

As further proof that this rule was not intended to be used

by the Commonwealth, it is submitted that Chambers v Mississippi, 410 U.S. 284, 93 S.Ct. 1039 (1973), makes this clear. This was a Mississippi rule barring, (in Mississippi one cannot not call a witness and then impeach him), the admissions of declarations against penal interest, which the defendant in Chambers sought to have introduced. (Chambers sought to introduce a confession and other admissions that McDonald had killed the person, for impeachment). The Court refused to admit, on behalf of the defendant, evidence of a third party confession and statements against third parties. The United States Supreme Court in Chambers stated that the Third Party Confession should come in for the benefit of the defendant and further stated, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." The Court found that such exclusion denied the defendant's due process of law and reversed, finding that the right to confront and cross examine a witness has long been recognized as essential to due process.

The admission of such a statement is historically discussed in Ellison, at 404. This rule, which apparently had been adopted solely for the defendant's benefit, was "out of line with the current of authority". At Ellison, they particularly stated that the admission of this rule, "of an extra judicial confession, exculpatory of the accused and made by a dead or otherwise unavailable witness is admissible as an exception to the hearsay rule".

There is nothing indicated in the Virginia cases, prior to

Chandler, that the rule which has been narrowly interpreted by this Court, should ever allow the Commonwealth to introduce a statement of third party implicating the defendant as was done in this case and in Chandler; and there is equally no language in the prior opinions allowing the statements in such a written confession containing statements of police officers that they believed the third party was telling the truth about the defendant killing a victim.

The rule of the admission of a declaration against interest or a confession prior to 1995 as an exception to the hearsay rule was only admissible in approximately five states, Virginia being one of them.

The statements in Chandler and the subsequent cases violate the constitutional rights of the defendant and certainly the statements of the police officers were hearsay.

18. **Did the trial court err when it determined that a co-defendant's statement met the criteria set forth in Chandler v Commonwealth, 249 Va. 270, 455 S.E.2d 219 (1995) and the requirements of the confrontation clause. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1445-1446, 2212-2225, 2253-2282, 2318-2332, 2350-2359, 2787, 3071-3082, 3094-3117, 3136-3137)**

The Commonwealth over the Defendant's objections, introduced an out-of-court statement made by a co-defendant that specifically addressed the issue of guilt of the Defendant. The trial court held, after determining that Mark Lilly was unavailable, that his statement was admissible under Chandler v Commonwealth, 249 Va. 270, 455 S.E. 2d 219 (1995). Chandler

relied on Ellison v Commonwealth, 219 Va. 404, 247 S.E.2d 685 (1978) which holds that the confrontation clause will be satisfied if the following requirements are met:

1. Witness unavailable
2. The statements are against the declarant's penal interest making the statement inherently reliable

When examining Mark Lilly's statements to Investigators Price, Fleet and Hamlin it becomes clear that Mark Lilly was lying to them and attempting to give statements which would serve Mark's own desire to exculpate himself. Especially when it is taken into account that Mark Lilly was told the penalties he was facing and being encouraged by Fleet and Hamlin, on page A.2323 of Mark Lilly's statement to them, not to "take the rap" and that he was not the one who pulled the trigger.

In the first interview conducted by Price, (A.2257) Mark Lilly describes Gary Barker as his "brother's buddy" when in fact Barker and Mark Lilly were living together in a single bedroom mobile home, which they had rented from Alfred Falls. (A.2430, 2433) In addition Mark Lilly contradicts that assertion when he tells Fleet and Hamlin during the second interview, on page 2 of his statement to them (A.2319), that Ben came over to their trailer when Barker and Mark Lilly were still in bed.

Mark Lilly goes on to tell Hamlin that they had been drinking liquor and were drunk before the break-in at Danny Sanders' home, but according to the co-defendants' own statements they didn't have liquor until they stole it from Sanders' home.

The excuse of drunkenness is used throughout the interviews by Mark Lilly to distance himself from criminal activity and lay the blame at the feet of his brother and not the man he is living with. When Mark Lilly is asked where all the liquor came from, he implicates Ben as the sole one who stole it out of Danny Sanders' home. Specifically Price asks, "and when you say 'they got it out of a house', who are you talking about 'they'?" Mark replies "Ben". (A.2258) Price then asks "talking about Ben and who else?" and Mark Lilly then replies "Lilly, just Ben." Ibid. Price asks again "Just Ben, or Gary was with them?" Finally Mark Lilly admits " we was all on it." This admission makes it clear that Mark Lilly is trying to shift the blame away from himself and Gary Barker. Further, a reasonable inference can be drawn that Mark Lilly realized that Barker had admitted to Price that "they" had gone into Sanders' home when Price asked Mark Lilly again whether it was "just Ben or was Gary with them." In addition, when Price asks where the Sanders home was, Mark Lilly replies "somewhere in Floyd is all I can tell ya." (A.2258) When Mark Lilly is asked by Hamlin (A.2320) about the whose house was broken into, Mark Lilly denies knowing whose house it was and at first can only "guess" that he went in. According to Sanders, Mark Lilly had been to Sanders' home on several occasions, knew where Sanders' guns were kept and knew that Sanders worked out of town. (A.1626, 1627, 1630) On A.2259, Mark Lilly again gives another self-serving statement when asked by Price what other things were taken out of the Sanders home. Mark Lilly replies "I

don't, I don't really know, you know, everything that was got out cause I was drunk." When questioned further by Price, Mark Lilly gives a detailed account of what was taken. (A.2259-2260) When asked whose residence it was Mark Lilly gave no verbal statement, but according to Price, Mark Lilly indicated that he did not know whose home it was or its location. (A.2289) However, it is clear from Sanders that Mark Lilly had been in Sanders' home on several occasions.

As the questioning turns toward the abduction, robbery and murder Mark Lilly again distances himself from these events. When asked by Price if they all got in Alexander DeFillippis' vehicle, Mark Lilly gives yet another self-serving statement on page A.2263, that he "had to or get left man, I was so drunk." Mark Lilly tells Hamlin on page A.2322 that he didn't get out of the car when DeFillippis was robbed, but when he testified at the sentencing hearing in February of 1997, Mark Lilly admitted that he was the one who robbed DeFillippis. (A.3095, 3099)

When giving statements to Price, on page A.2271, about the time when the murder takes place Mark Lilly states that he nor Barker ever got out of the car. Again a self-serving statement that not only attempts to protect Mark Lilly, but Barker as well. However, it was clear from both the physical evidence and statements by Barker that both Mark Lilly and Barker got out of the car at the scene of the murder. The money clip found on the scene was identified as being the same one taken from Sanders' home and the one that Mark Lilly claimed at residence of Warren

Nolan and Patricia Quesenberry. (A.1591-92, 1605) Moreover, Barker stated that Mark Lilly got out of the car and they laughed at DeFillippis when the victim was stripped.

When asked about the distance that DeFillippis was shot by Ben Lilly, Mark Lilly stated that the distance was ten to fifteen yards on page fifteen of Mark Lilly's statement, while Barker describes the shots as coming from point blank range. Mark Lilly does not mention that he and Barker laughed at the victim when he was stripped down to his underwear, rather Mark Lilly states to Price "I don't know." (A.2268)

When Mark Lilly is asked questions about the robberies that took place immediately after the murder, he cannot remember that Barker had the murder weapon and used it to commit the robbery. When asked about taking a twelve-pack of beer from the first store, Mark Lilly states to Price "... I was so drunk, I don't do that shit, you know, if I'm sober." " I had money in my pocket." (A.2273) When asked if he got money from the first robbery Mark Lilly initially states "They got some." Only after subsequent questioning does Mark Lilly admit to Price, ibid, that he received a share of the money.

In regard to the second robbery in Giles, Mark Lilly states that "they got their stuff", not that he took his share as Barker suggested. (A.2278)

On page A.2279 in his statement to Price, Mark Lilly denies taking the murder weapon when he fled from the car when police arrived, even though the gun was found in the direction he fled.

However, the most illuminating fact is Mark Lilly's testimony, given under oath, where he admits lying to Price, Fleet and Hamlin because he was scared when Price started talking about all those life sentences and decided to "(t)hrow it off on somebody else." (A.3096) When asked why he did not testify at Ben's trial Mark Lilly responded "I hadn't been to court yet" and that his "... lawyers told me that it was in my best interest to keep my mouth shut, so that's what I did. I took the fifth." (A.3096, 3100)

The appellant argues that Mark Lilly was, at every opportunity, trying to distance himself from his brother and place himself in the best possible light in order to avoid the life sentences and possible death penalty that Price had mentioned.

When applying the 6th through the 14th Amendments of the United States Constitution to the matter at hand we know that Mark Lilly's statements, besides being contradictory in themselves, more importantly are inconsistent with the facts, the physical evidence, and the other witnesses' statements. One of the confrontation clause's purposes is to allow the defendant to confront his accusers, and to place these accusers under oath. When placed under oath Mark Lilly admitted he lied to the Investigators and refused to testify at the trial in order to protect himself.

Finally, even the trial court had some trouble in determining whether the statements made by Mark Lilly were

against his penal interest when it stated that "...the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy." (A.2227)

19. Did the trial court err when it refused to grant a mistrial after the Commonwealth's Attorney displayed before the jury a large photograph of the deceased victim, intending to incite or inflame the jury, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1477-1479, 1516-1517)

Not only are prosecuting attorneys under a duty to prosecute, but they are under a duty to see that the accused gets a fair and impartial trial. McClane v Commonwealth, 202 Va. 197, 116 S.E.2d 274 (1960). Jones v Commonwealth, 196 Va. 10, 82 S.E.2d 482 (1954), further held that the Commonwealth Attorney should refrain from observations or remarks that evidence feelings of prejudice.

Certainly this rule was not followed in the matter at hand, when a photograph of the victim in life was displayed in front of the jury.

21. Did the trial court err when it allowed, in addition to the testimony of Doctor Oxley, his written report as evidence before the jury, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1984-1995, 2000)

Some of the tests and reports in this matter were not conducted by Dr. Oxley, and are hearsay. However, the trial court ruled that they were admissible under the business records exception to the hearsay rule. Lilly maintains that this was error on the part of the trial court.

23. Did the trial court err when it refused to declare a mistrial after a co-defendant, (Barker) read an article in

the newspaper concerning the trial despite the fact that Barker was sequestered, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1452-1463, 2113-2114)

Early in the trial there was a motion to sequester the witnesses, which the trial court granted. However, in spite of this sequestration order, Barker elected to read newspaper accounts of the ongoing trial in violation of the trial court's order. Appellant maintains that if a sequestration order is to have any validity it must bind the witness to refrain from discussing the case and abstain from reviewing media descriptions of the proceedings. Moreover, sequestering the witness plays an important role in assuring a fair trial to both sides.

24. Did the trial court err when it allowed a police officer (Officer Whitset) to testify concerning statements allegedly made by the defendant before he was Mirandized; in particular, asking the Defendant: "what does a murderer look like?", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.242-278, 361-366, 2197, 2348, 3025-3026)

Officer Whitset asked the defendant, "what does a murderer look like?". The defendant's alleged response was, "me". Clearly, this was an incriminating statement and should have been suppressed. The defendant also stated he was going to hell to meet his brother, which was also in response to a question by the officer.

25. Did the trial court err when it allowed statements allegedly made by the Defendant to Chief Whitset when the officer said he "thought he heard the statement", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.247-278, 361-366)

On the night in question Appellant was placed in a patrol car after being taken into custody by officer Randy Tilley. Shortly thereafter Chief Whitset arrived on the scene and positioned himself outside of the vehicle in which Benjamin Lilly had been placed. Whitset admitted that he questioned Lilly about the identity of the others in the car, and whether those who had fled were armed. (A.258-261) Subsequently to this questioning Whitset states that Lilly asked Whitset to "do him a favor." (A.261-262) This "favor" was to put Whitset's shotgun in his mouth and pull the trigger. Whitset refused and stepped back away from the car. (A.274) Then Whitset asked Lilly "what does a murderer look like?" In response Whitset stated that he thought he heard Lilly say "me." (A.268) Whitset admitted that at the preliminary hearing he had "solicited" the question but "wouldn't construe it as being incriminating." (A.268-269) Moreover, Whitset knew at the time of the questioning that multiple armed robberies had taken place when he solicited the question from Lilly. (A.271) Whitset also stated that he had trouble hearing Lilly when he stepped away from the vehicle. (A.260)

The appellant maintains that Miranda applies to the matter of whether the statement was admissible against Lilly. There is no doubt that Lilly was in custody during the time that the above stated conversation took place meeting the first requirement of Miranda. The next issue is whether the statement was voluntary as the trial court held or whether the response "me" was solicited by the officer as Whitset stated. Whitset admitted on the day of

the motion hearing, as he did at the preliminary hearing, that the response was "solicited" by him. Moreover, when asked on cross-examination Whitset admitted that he had backed away from the vehicle in which Lilly was sitting. (A.274) This statement was not initiated by Lilly, rather it was solicited by Whitset and violates Lilly's rights as guaranteed by the U.S. Constitution specifically his fifth and sixth amendment rights through the fourteenth amendment.

In addition, on December 7, Whitset stated that he thought he heard Lilly say "me". However, when called to testify at the preliminary hearing and at the motion hearing Whitset stated that he was shocked by Lilly's response and the reason he said "thought" was because he only wanted to verify what Lilly had said. However, Whitset admitted that he had trouble hearing Lilly when he was backed away from the car, as he was when this statement was allegedly given. Furthermore, Whitset admitted that his memory was better on December 7 than at the preliminary hearing or at the motions hearing.

The appellant maintains that the trial court erred when it allowed this statement in because it was speculation on Whitset's part, and that its admission was a violation of Lilly's Miranda rights. Evidence placed before a jury is not intended to be mere guesswork; rather, Whitset thought he heard Lilly or he didn't. However, when you examine the fact that Whitset asked Lilly what he had said and moved closer to the car a reasonable conclusion can be drawn that Whitset was not certain what Lilly had said.

26. Did the trial court err when it did not allow statements of a co-defendant and one of the Commonwealth's primary witnesses to be admitted, admitting that he had engaged in certain conduct that one could infer that he had the necessary intent to kill the victim, violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.2372-2376, 2388)

Approximately five hours prior to the murder, co-defendant Barker made statements about shooting his best friend (A.2400, 2404, 2504-2516) to Joyce Lang. Such statements alarmed her to the extent that she refused to allow her son to go with Barker.

This evidence was favorable to the defendant and Section 8 of the Virginia Constitution, as well as the United States Constitution, allow the defendant to call for evidence in his favor.

Barker had the murder weapon and admitted he possessed the same shortly after the murder. These statements would further advance the Appellant's theory that Barker was the trigger man.

27. Did the trial court err when it failed to give an instruction on intoxication reducing the Capital Murder offense to a lower crime, in violation of the Defendant's rights as guaranteed by the fifth, sixth, eight and fourteenth Amendments in the United States Constitution? (A.2677-2680)

There was more than a small amount of evidence, or "a scintilla" to support this instruction. There was evidence of large amounts of alcohol being consumed, as well as the statement of the Appellant.

28. Did the trial court err when it failed to grant a mistrial after the Commonwealth's Attorney during his closing argument pointed the murder weapon in the direction of the Defendant and his counsel; and when the defense objected to

the Court, the Court in front of the jury called the Defendant's objection ridiculous, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2763-2776, 2794-2795, 2801-2805)

During the Commonwealth's closing argument the Commonwealth's Attorney pointed the murder weapon at the defense counsel and/or the defendant; defense counsel objected to said action and requested a mistrial. (A.2763, 2772) The trial court in ruling on the Defendant's motion called the motion "ridiculous" before the jury. (A.2764) This Court held in Compton v Commonwealth, 190 Va. 48 (1949) that the "[r]ulings made in words or manner indicating antagonism or resentment toward counsel may convey the impression that the feeling includes also counsel's client." First and foremost, the Appellant argues that objecting to someone pointing a gun in counsel's direction is a natural action and should not be referred as ridiculous. However, the actual harm came from the statement by the trial court. By angrily calling the defense motion ridiculous the trial court gave the jury the impression that it was appropriate to point the gun at the defense, effectively undermining defense counsel's creditability with the jury. Appellant argues that this antagonism was uncalled for, inappropriate and constitutes reversible error. The aforesaid statement of the trial court clearly indicated antagonism or resentment by the trial court which was prejudicial to the defendant. Moreover, defense counsel requested a corrective instruction in an attempt to lessen the effect of the trial

court's statement, but again the trial court refused to grant any corrective instructions to the jury. (A.2774-2777)

29. Did the trial court err at the guilt phase in refusing to give an Instruction that told the jury if they had a reasonable doubt as to the grade of punishment, to impose the lower grade, (life), violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2970)

Although there is little authority on the proffered jury instruction, there is abundant authority in Virginia on closely related matters. A similar instruction has been given involving the grades of the offense. Sanderson v Commonwealth, 200 Va. 51, 103 S.E.2d 800 (1958).

30. Did the trial court err when it refused an Instruction telling the jury that they could consider at the penalty stage residual remaining doubt that the defendant committed the offense, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2976-2977)

It is submitted that it was error to refuse this instruction. Lockhart v. McCree, 476 U.S. 162 (1986). It is true that the Stockton Case states that this instruction should not have been given, but it is submitted that the Constitution calls for its inclusion.

33. Did the trial court err when it failed to hold Virginia's death penalty statute unconstitutional violating the Defendant's rights as guaranteed by the fifth, sixth, eighth, and fourteenth Amendments in the United States Constitution? (A.359-361)

Appellant concedes that Virginia case law has held that Virginia's death penalty meets all constitutional requirements. However, Appellant argues that the death penalty constitutes

cruel and unusual punishment. The Virginia statute is vague in both the "vileness" and "future dangerousness" issues and Appellate asks this Court to consider additionally the brief filed in the trial court Record and incorporates the same by reference.

34. Did the trial court err when it allowed the Commonwealth to introduce the taped statements of Mark Lilly when the Commonwealth only provided a written transcript of the statement prior to trial, violating the Court's Discovery Order and in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2228-2232, 2250)

Without question the government violated the trial court's discovery order. The defense was not allowed to hear Mark Lilly's devastating taped statements until after the trial began. (A.2228-2232) Although the Commonwealth had provided a written copy of the transcript, it did not provide a copy of the audio tape. However, the trial court's discovery order specifically stated:

> All alleged confessions or statements of any kind made by the Defendant or any alleged co-conspirator that may be pertinent to this case in every media in which each such confession or statement may exist (in substance or verbatim), including, but not limited to audio tapes, video tapes, film, shorthand notes, print, typing or handwriting. (A.48)

The government violated this discovery order in violation of the defendant's rights.

CONCLUSION

It is submitted that any one, or a combination of the errors assigned, would entitle the Appellant to a retrial in this matter. In addition, Appellant requests to be allowed to present

oral arguments in support of this Appellant Brief.

BENJAMIN LILLY

By Counsel, Max Jenkins

By Counsel, Christopher A. Tuck

CERTIFICATE OF SERVICE

Max Jenkins
Jenkins & Jenkins
P.O. Box 886
Radford, VA 24141
(540) 639-9088

Christopher A. Tuck
Attorney & Counselor at Law
P.O. Box 11422
Blacksburg, VA 24062
(540) 552-4567

We, Max Jenkins and Christopher A. Tuck, Court-Appointed Counsel for Appellant, Benjamin Lee Lilly, do hereby certify that true and correct copies of the above Appellant Brief have been mailed to the Clerk of the Supreme Court of Virginia at 100 North Ninth Street, Richmond, Virginia 23219; Appellee Katherine Baldwin, Assistant Attorney General at 900 East Main Street, Richmond, Virginia 23219, (804) 786-9527; on this 7th day of January, 1998. In addition, Appellant requests to be allowed to present oral arguments in support of this Appellant Brief.

Christopher A. Tuck

IN THE SUPREME COURT OF VIRGINIA
at Richmond

BENJAMIN LEE LILLY,	)	
	)	
Appellant,	)	
	)	Record Nos. 972385 & 972386
v.	)	
	)	
COMMONWEALTH OF VIRGINIA	)	
	)	
Appellee.	)	

PETITION FOR REHEARING

COMES NOW the Appellant, Benjamin Lee Lilly, by counsel, and pursuant to Rule 5:39 of the Rules of the Supreme Court of Virginia petitions this Court for a rehearing on the issues described below.

I. THE COURT ERRED IN UPHOLDING THE ADMISSION OF MARK LILLY'S OUT OF COURT STATEMENT

This Court's conclusions regarding the admissibility of Mark Lilly's out of court statements were unreasonable conclusions of law and applications of fact, and left uncorrected violations of Benjamin Lilly's Sixth Amendment right to confrontation and Fourteenth Amendment right to due process.

Case after case in the Supreme Court of the United States makes clear that portions of hearsay declarants' statements which are inculpatory of the accused must be subject to the Sixth Amendment right to confrontation and cross-examination. In Douglas v. Alabama, 380 U.S. 415 (1968), the Supreme Court held that the prosecutor's reading of a nontestifying codefendant's statement inculpatory of the accused under the guise of refreshing his recollection violated the Confrontation Clause. The Court later recognized that the violation in Douglas was not as serious as it was in a case in which the statement was actually offered as substantive evidence. Bruton v. United States, 391 U.S. 123 (1968). In that case, like Lilly's, the codefendant's statement was admitted as substantive evidence.

> Even greater, then, was the likelihood that the jury would believe [the declarant] made the statements and that they were true - not just the self-incriminating portions but those implicating Petitioner as well. Plainly, the introduction of [the declarant's] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination since [the declarant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation.

Bruton, 391 U.S. at 127-128. The Court reiterated its objections to the use of a codefendant's hearsay statements as substantive evidence against the accused in Lee v. Illinois, 476 U.S. 544 (1986) (Sixth Amendment violated where presumptively unreliable statement of codefendant introduced against accused at joint bench trial).[1] Despite this clear guidance from the Supreme Court, this Court found Mark Lilly's statements admissible.[2]

[1]This Court relies on Raia v. Commonwealth, 23 Va. App. 546, 478 S.E.2d 328 (1996), in support of its conclusion that the trial court's admission of Mark Lilly's statement was not in error. The Raia Court attempts to avoid the clear dictates of Bruton and Lee by arguing that those cases involved joint trials. Id. at 549, 478 S.E.2d at 330. In neither case did the Supreme Court provide such a basis for limiting their holdings. It is clear that the damage done by the inability to cross-examine a witness against the accused is unaffected by whether or not the witness is being tried in the same action. Each and every argument underlying Douglas, Bruton, and their progeny is applicable to the instant case.

[2]Without acknowledging Douglas, Bruton, or Lee, this Court relies on White v. Illinois, 502 U.S. 346 (1992). White, however, does not concern the presumptively unreliable statements of a codefendant. White considers only whether to impose an unavailability requirement on the hearsay exceptions of excited utterance and statements made in the course of medical treatment.

a. The statement against interest exception is not "firmly rooted"

Hearsay may be admitted without violating the Confrontation Clause if it falls into a "firmly rooted" hearsay exception. Ohio v. Roberts, 448 U.S. 56 (1980). No "firmly rooted" exception is present in Lilly's case. Those exceptions which the Supreme Court has deemed to be "firmly rooted" are those which "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection [of the Confrontation Clause]'." Ohio v. Roberts, 488 U.S. at 66 (1980), quoting Mattox v. United States, 156 U.S 237, 244 (1895). As this Court noted, "a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability." Slip Op. at 21, quoting White v. Illinois, 502 U.S. 346, 357 (1992). The Supreme Court has found numerous hearsay exceptions to be firmly rooted. Ohio v. Roberts, 448 U.S. at 66 n. 8 (dying declarations, business records, public records) (internal citations omitted)); California v. Green, 399 U.S. 149, 165-168 (1970) (preliminary hearing testimony); Manchus v. Snubbs, 408 U.S. 204, 216 (1972) (prior trial testimony); Mattox v. United States, 156 U.S. 237, 244 91985) (first trial testimony). The Supreme Court has not found, however, that the statements against interest exception qualifies for this status. Williamson v. United States, 512 U.S. 594, 605 (1994).

In fact, far from suggesting such statements are inherently reliable, the Supreme Court has found that statements of codefendant shifting blame to other defendants are presumptively unreliable. Lee v. Illinois, 476 U.S. at 543. A presumptively unreliable statement cannot be the basis of a "firmly rooted" hearsay exception. See, e.g., Douglas v.

Alabama, supra, 380 U.S. 415; Bruton v. United States, supra, 391 U.S. 123; Lee v. Illinois, supra, 476 U.S. 544; Williamson v. United States, supra, 512 U.S. 594.

b. Mark Lilly's statement was not a statement against interest

Even if the statement against interest exception is deemed to be firmly rooted, this Court's conclusion that those portions of Mark Lilly's statements exculpating himself and inculpating Benjamin Lilly as the triggerman constituted statements against interest is patently unreasonable.[3] The notion that statements against interest should be admitted as hearsay is grounded in the belief that reasonable people will not make self-inculpatory statements that are not true. See Williamson v. United States, 512 U.S. at 603-604. Thus, there is no basis to vest self-exculpatory statements with any indicia of credibility not afforded ordinary hearsay. The suggestion that these exculpatory statements are somehow more credible as a result of their proximity to inculpatory statements has been expressly rejected by the Supreme Court. "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." Williamson v. United States, 512 U.S. at 599.[4]

---

[3]Lilly notes that the Commonwealth retains a great deal of control over whether a criminal defendant will be unavailable for purposes of invoking the statements against interest exception. If the Commonwealth believes that the value to the prosecution of one codefendant's statements will diminished by exposure to cross-examination, it can simply delay the codefendant's trial him that when he takes the stand in his codefendant's trial he will avoid cross examination by invoking his right to silence. The prosecution thereby gains the advantage of admitting the statement without exposure to cross-examination.

[4]This Court has attempted to avoid the dictates of Williamson, which held that a statement like Mark Lilly's was not admissible under the federal rules, by arguing that the entire decision was inapplicable because it was based on a federal rule. Chandler v. Commonwealth, 249 Va. 270, 279, 455 S.E.2d 219, 225, cert. denied, 516 U.S. 889 (1995).

The Supreme Court has held that statements of codefendants are "presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread the blame, curry favor, or divert attention to another." Lee v. Illinois, 476 U.S. at 545. As Justice O'Connor has pointed out "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially the truth that seems particularly persuasive because of its self-inculpatory nature." Williamson v. United States, 512 U.S. at 599-600. Mark Lilly was trying to shift blame to Benjamin Lilly for the far more serious crimes while he implicated himself in more minor criminal activity. That is clear, not only from his statement, but also from the fact that Mark Lilly admitted that was his intention. A. 3096. As the Court found in Lee,

> Even Justice Harlan, who was generally adverse to what he regarded as an expansive reading of the confrontation right, stated that he "would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption."

Lee v. Illinois, 476 U.S. at 541-542, quoting Dutton v. Evans, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). Mark Lilly's testimony has withdrawn any basis the Court could have for assuring his authorization or adoption of the original statement. His testimony is also is powerful evidence of the effect cross-examination would have had to benefit Lilly.

c. This Court's analysis of reliability was flawed

This Court held that Mark Lilly's statement was reliable because aspects of the statement were "independently corroborated by Barker's testimony, by the physical evidence,

---

Such reasoning may be persuasive with regard to any Confrontation Clause arguments, but the Court's language regarding the meaning of the statements against interest exception is still persuasive.

and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities." Slip op. at 20 (no record citations provided). The Supreme Court has expressly held that such comparisons of the out of court statement with other evidence are insufficient to find the statement reliable. Idaho v. Wright, 497 U.S. 805 (1990). The Court held that to support a statement's reliability on this basis "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial," and that the existence of such collateral corroboration "would be no substitute for cross-examination of the declarant at trial." Id. at 823. The Wright court concluded that the reliability of the out of court statement must be based on the "totality of the circumstances that surround the making of the statement." Id. at 820. Subject to this proper test, the unreliability of Mark Lilly's statement is manifest. The record reflects that Mark Lilly made his statement because he was scared when the interrogating officer began to threaten him with life sentences and decided to "(t)hrow it off on somebody else." A 3096.

Furthermore, any reliance by this Court on Hines v. Commonwealth, 136 Va. 728, 117 S.E.2d 843 (1923), is misplaced. In Hines, this Court determined that a statement against interest was admissible so long as there was something "substantial other than the bare confession to connect the declarant with the crime." Id. at 748, 117 S.E.2d at 849. This standard was obviously intended to govern the admissibility of confessions of declarants which exculpated the accused. Because the government, against whose case such a statement would be admitted, has no constitutional right to confrontation, such a forgiving standard is appropriate. A standard governing admission of statements which will divest the defendant of his constitutional right to confront the witnesses against him, however, must surely be

higher.

d. Mark Lilly's statement does not bear sufficient indicia of reliability under any test

Even if the Court determines it was correct to consider external evidence to determine the reliability of Mark Lilly's statement, its conclusion based on the facts was absolutely unreasonable.[5] The Court makes its bare conclusion that Mark Lilly's statement is corroborated by other evidence without any citation to or support in the record. In fact, the record contradicts this Court's conclusion in many respects.

First, Mark Lilly's statement is not consistent with the physical evidence at the scene. The only physical evidence at the scene was the victim's glasses and Mark Lilly's money clip. A. 1591-92, 1605. Mark Lilly stated, however, that he never got out of the car while at the scene.

Second, Mark Lilly's statement is not consistent with Gary Barker's testimony. Mark Lilly stated that he was unaware of how the victim became undressed because he (and Barker) never exited the car. Gary Barker stated that he and Mark Lilly both exited the car and laughed at the victim's state of undress. A. 2062. Mark Lilly stated that the victim was shot from a distance of ten to fifteen yards. A. 2268. Gary Barker stated that the victim was shot at point blank range. A. 2148.

Third, the Court's assessment of the credibility of Mark Lilly's statement ignores entirely Mark's Lilly's own testimony that he made the statement because he was scared and

[5]Lilly notes that this Court was unable to make a reasonable determination of the totality of the circumstances on appeal as it is prohibited from considering any facts not favorable to the Commonwealth. Slip Op. at 3.

wanted to put the blame onto somebody else. A. 3096.

II. THE COURT ERRED REGARDING THE VOIR DIRE OF JURORS REGARDING PAROLE INELIGIBILITY

The trial court's refusal to allow Lilly to voir dire the jury regarding the possibility of a sentence of life without parole violated three interrelated, fundamental requirements in death penalty cases: reliability, mitigation, and confrontation. See Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1986); Gardner v. Florida, 430 U.S. 349 (1977). It is a well established Eighth Amendment requirement that a capital sentencing authority must be able to consider "any relevant circumstance that could cause it to decline to impose the [death penalty]." McCleskey v. Kemp, 481 U.S. 279, 306 (1987); Lockett, 438 U.S. at 605; Skipper, 476 U.S. at 5. "[T]he Court has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty." Walton v. Arizona, 497 U.S. 639, 649 (1990); see also Mills v. Maryland, 486 U.S. 367, 374-75 (1988)("[T]hat 'the sentencer may not . . . be precluded from considering "any relevant mitigating evidence"' is ... 'well established.'") (citations omitted); Gregg v. Georgia, 428 U.S. 153, 204 (1976) ("[T]he jury [should] have as much information before it as possible when it makes the sentencing decision.").

Counsel and the court must be able to ensure that jurors will be selected who are able to give effect to mitigating evidence. Mills v. Maryland, 486 U.S. 267 (1988). Refusal to permit counsel to inquire of the jurors regarding parole also creates an impermissible risk that jurors will be seated who will impose a sentence based on extrinsic and erroneous information. Instruction or argument in this regard is not sufficient. Witherspoon v. Illinois, 391 U.S. 510 (1968); Morgan v. Illinois, 504 U.S. 719 (1992). A juror might sit

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 1

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did seize from Alexander V. Defilippis a 1986 Dodge Aries belonging to Ezio Defilippis with the intent to deprive Alexander V. Defilippis of possession of the automobile by means of the threat or presenting of a firearm; these acts constitute the crime of carjacking.

VA. CODE § 18.2-58.1.

A TRUE BILL

FOREMAN

WITNESS:

Investigator R. L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 2

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use or display in a threatening manner a firearm while carjacking the automobile in possession of Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL

FOREMAN

WITNESS:

Investigator R. L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 3

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY, by force or intimidation, did seize, take and transport Alexander V. Defilippis with the intent to deprive him of his personal liberty without legal justification or excuse; these acts constitute the crime of abduction.

VA. CODE § 18.2-47; Punishment: § 18.2-10(e).

A TRUE BILL

FOREMAN

WITNESS:

Investigator R. L. HAMLIN

5

RGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 4

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use or display in a threatening manner a firearm while abducting Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL

FOREMAN

WITNESS:

Investigator R. L. HAMLIN

6

7

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 5

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did rob Alexander V. Defilippis of his wallet, watch, clothing, and other personal belongings.

VA. CODE § 18.2-58.

A TRUE BILL

Robert K. Ross
FOREMAN

WITNESS :

Investigator R. L. HAMLIN

7

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 6

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use a firearm while robbing Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL

Robert K. Ross
FOREMAN

WITNESS:

Investigator R. L. HAMLIN

8

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 7

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did willfully, deliberately, and with premeditation kill and murder Alexander V. Defilippis in the commission of robbery while armed with a deadly weapon.

VA. CODE § 18.2-31.4; Punishment: § 18.2-10(a).

A TRUE BILL

Robert K. Miller
FOREMAN

WITNESS:

Investigator R. L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 8

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use a firearm to murder Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL

Robert K. Miller
FOREMAN

WITNESS:

Investigator R. L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 9

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995 , in the County of Montgomery,

BENJAMIN L. LILLY, having previously been convicted of a felony under the laws of this Commonwealth, did knowingly and intentionally possess a firearm.

VA. CODE § 18.2-308.2.A.(i); Punishment § 18.2-10(f)

A TRUE BILL

Robert K. Sim
FOREMAN

WITNESS:

Investigator R. L. HAMLIN

11

well, it's warm. And I said, Mark, is the gun hot? He said, yes, at which time I handed the gun back to him. I put the bullets back into the chamber and handed it back to him and about that time both Gary Barker and Benjamin Lilly came out and approached the car and at that time, I remember Gary reaching in the back seat and pulling out a 12 gauge shotgun and, ah, Ben Lilly was right behind him or close, close there with him, and Ben Lilly said, put the, the God damn guns away, and that's pretty much all I remember the guns being put into the trunk of the car. I got out of the car and went back into Cowboys and they weren't there very much longer.

Q. Did they come back into Cowboys?

A. I don't believe so.

Q. So, you saw a shotgun and a pistol?

A. Yes, sir.

Q. And you said you unloaded the gun and it was a revolver?

A. Yes, sir.

Q. And then reloaded it?

A. I reloaded it, yes.

There was a graze wound next to the entrance wound where the bullet grazed the lip, entered the lip, passed across the lip and exited the other side. Ah, a little bit of bruising on the inside of the lip, no teeth were fractured or missing. No bullet was recovered. Wound Number Two (2) was located at the angle of the left jaw, just below the lobe of the left ear, in this region (pointing). This wound was oblique and it was oriented backward. There was no, no gun shot residue incidently around any of these wounds on the skin. The bullet passed backward through the soft tissue by the jaw and exited the back tissue of the soft tissue of the back of the neck. This bullet struck no vital structures and was not a lethal wound. No bullet was recovered. Wound Number Three (3) was located in the right temporal area just above the right ear and at this point (pointing). This wound was surrounded by a small amount of bruising. Ah, the wound path was from right to left and horizontal. The bullet passed through the brain, both halves of the brain, and was recovered beneath the left temporal bone in this region (pointing). This bullet was a lead alloy

and two feet away?

A. No. Greater than that distance.

Q. Oh, --

A. How much greater, I can't say.

Q. So, it would be somewhere beyond two feet?

A. Yes, sir.

Q. Now, you indicated, ah, that there was bruising around the one in the right forehead -

A. In the right temporal.

Q. The right temporal. And what does that indicate?

A. Nothing. It's a nonspecific finding.

Q. Did it indicate, did the examination of the body indicate that there had been bleeding -

A. There had been bleeding, yes, from all of the wounds.

Q. Now, can you tell the Court the wound to the lip. There was a slight graze and then it passed through. What kind of effect would that have on a person if they were hit by that kind of shot?

A. It would be painful, but not disabling.

Q. Okay. So, it was on the back side of his jeans then?

A. That is correct.

Q. Were you able to amplify that? I didn't hear that, the, and he may have asked you that question. Were you able to amplify that blood that we're, that you found on the back of those pants?

A. No, no amplification results were obtained with that particular sample.

Q. Based on what you know about this situation, can you testify whether that's Benjamin Lilly's blood, and there, just so you'll know, there's been evidence that there was a goose that was killed and I'm going to show the witness Exhibit Eleven (11), blood on the back of the car, or a reddish material appearing on the back of the car and a dead goose. Can you tell us whether that blood came from that goose or can you tell us where that blood came from? Whose blood that is?

A. No, I cannot based upon my testing.

Q. Okay. Now, you indicated that on, in your report on October the 1st, the request for examinations

A. No, sir.

Q. So, how did you end up at Mr. Sanders or Mr. Saunders?

A. We just drove up there and was going to drink a little bit with him and he wasn't there and we decided just to go on in and help ourselves.

Q. And how did you go in?

A. Busted out the front glass in the door.

Q. And went inside?

A. Yes, sir.

Q. Did you all stay there for a while?

A. Nah, we was in and out pretty quick.

Q. All right. Did you take anything while you were there?

A. Yeah.

Q. What did you take?

A. Nine (9) liters of liquor and three (3) guns.

Q. Different kinds of -

A. Yeah.

Q. Liquor?

A. Yes, sir.

Q. Were most of them full or -

A. Yeah, they was all full.

Q. And the guns?

A. Ah, all of them had a few shells in them.

Q. Okay. Was anything else taken besides the guns and the liquor?

A. A safe.

Q. Where did that come from?

A. Ah, behind his bar.

Q. What kind was it?

A. Ah, it was, I guess like a fireproof safe.

Q. What was it made out of, if you know?

A. Ah, I'm not sure.

Q. Okay. And what did you do with those items after you took them?

A. Ah, we was, we was drinking liquor and the safe, ah, we got into it and it wasn't anything worthwhile in it.

Q. Now, where did you take the safe to get into it?

Q. Okay. And what happened there?

A. Ah, the shotgun got fired and the rifle got fired.

Q. Were they fired at anything in particular?

A. Yeah, at some goose, geese.

Q. And where were they?

A. At, in this church yard.

Q. And what did you fire?

A. I fired the rifle again.

Q. And do you know who fired the shotgun?

A. I'm pretty sure Mark did.

Q. Did you have either or both of the geese?

A. Ah, one (1) of them was flopping, it got away, but the other one (1) died.

Q. And what did you do after it died?

A. Ah, threw it up in the trunk.

Q. Do you know who carried it to the trunk?

A. I don't remember.

Q. I show you Commonwealth's Exhibit Number Eleven (11), the trunk, a photograph of a trunk with it open with a goose in it. Is that the goose that was

Price's Fork Road?

A. Ah, the car tore up.

Q. Do you know where it was near?

A. It was near the store, ah, -

Q. Did you make it through the stop light there?

A. Yeah, as a matter of fact we did and I had, and it stopped going up the hill on the other side of the light.

Q. All right. Then what did you do?

A. I drifted it back down to where it was setting when y'all found it.

Q. All right. And what did Mark and Ben do?

A. Ah, well, we, ah, was trying to take the tags off and get the liquor and the guns out of the car.

Q. What did, let me back up a second. What were they doing while you were drifting the car back?

A. Guiding me.

Q. All right. And you went a long way, if I remember correctly?

A. Yeah.

Q. Did you turn -

A. On oncoming traffic.

Q. And did you turn it off onto a side lane?

A. Yeah.

Q. And that's where it stopped?

A. Yeah.

Q. Was it on the right side or the wrong side of the road then?

A. It was on the wrong side.

Q. Okay. Then you said you tried to take the tags off?

A. Yeah.

Q. Were the tags taken off?

A. That's what we, we was trying to get the tags off and I don't remember if they come off or not and we was getting the guns and the liquor out of the car.

Q. And what were you going to do with them?

A. Ah, well, we would stash them in the woods or, or to steal us a car and get out of there.

Q. Okay. And who had the rifle at that point?

A. Yeah.

Q. And did you see where Ben went?

A. Yeah.

Q. Where did he go?

A. Over to that boy.

Q. Was the boy near a car?

A. Yeah.

Q. And what was he doing?

A. Just looking at his tire.

Q. Was the car running, or do you know?

A. Ah, I think it was running.

Q. Was he looking at a front tire or back tire?

A. Front tire.

Q. Driver's side or passenger's side?

A. Passenger's side.

Q. And Ben went up to him?

A. Yes.

Q. And where were you all then?

A. Walking towards the pine trees.

Q. And did you see what happened then?

A. Yeah, ah, he hollered - come on - and went over that way. He had the gun pointed at him and, ah, me and, I got in the passenger's side of the car and Mark got in the back of the car in the passenger's seat and Ben told the boy to get beside Mark and then Ben got behind the wheel.

Q. All right. Now, when you came up, was the person still standing by their front tire?

A. Ah, no, he was more in front of the car closer to Ben.

Q. And where was Ben at that point?

A. Ah, right at the right, at, right at the driver's front fender.

Q. Did you see if Ben had anything in his hand?

A. Yeah, he had the pistol in his hand.

Q. And what was he doing with the pistol?

A. Ah, just telling the guy to come on and give me your money or something sort of in that, of somewhere in that area.

Q. And did you see anything change hands

between the two (2) of them?

A. Yeah, I seen him hand him his wallet.

Q. All right. Did you see any bills or anything?

A. Yeah, it looked like maybe just like one (1) -

MR. TURK: Your Honor, I would object. I believe he's leading the witness through the last couple of questions.

THE COURT: All right, sir. Just rephrase them. You don't have to repeat the ones that have already been answered.

Q. And then the person got in the vehicle?

A. Yes.

Q. What did you and Mark do when the car doors opened?

A. We got in. We got in the car.

Q. Did you look towards the person?

A. No, looked away from him because of the overhead light in the car.

Q. He got in the back seat?

A. Beside Mark.

Q. Ben was driving at that point?

A. Yes, sir.

Q. And where did you go?

A. We started down towards Whitethorne.

Q. Back down Price's Fork from where you had come?

A. Yes.

Q. And where were you going?

A. Ah, just basically just down the road. Ah, you, we just was going to drop him off in, where he'd have to walk to get to a phone and we ended up in Whitethorne.

Q. All right. Did the person talk to you all while you went down?

A. Yeah, he, he, ah, told us that, ah, he'd have of, ah, gave us a ride if we had of asked and, ah, and told us if we would go back and get his friend, then, ah, back at the store, then, ah, he would take us wherever we needed to go.

Q. Did you all turn around?

A. No.

Q. Ben was still driving at this point?

A. Yes, at this point.

Q. And you pulled into Whitethorne?

A. Yeah.

Q. And what happened when you got there?

A. We'd told him to close his eyes so we could get out of the car because -

Q. Who is we?

A. Me and Mark. Because he had already seen Ben's face and, ah, we told him to close his eyes.

Q. And did you and Mark then get out?

A. Yeah, when he closed his eyes.

Q. And who else got out?

A. Ben got out.

Q. Now, did anybody have any firearms at that time?

A. Yeah, the, ah, the pistol was, ah, in, ah, the front of Mark's pants.

Q. Did Mark have the pistol back then?

A. Yeah. It went back and forth between

hands.

Q. And Mark was in the back seat with him?

A. Yes.

Q. And what did you do with the rifle?

A. It was still laying in the car.

Q. What part of the car?

A. Ah, in the front where I was sitting. In the front passenger's, in the floorboard.

Q. Do you know where the shot gun was?

A. Ah, I think it was in the floorboard too, in the back floorboard.

Q. Now, the shotgun, do you recall how much ammunition you had for that?

A. A, ah, I believe, I'm pretty sure we only had two (2) shells for that and one (1) of them was shot at the goose.

Q. Everybody got out at Whitethorne?

A. Yes, we sure did.

Q. Was the car still running?

A. No.

Q. Were the lights on?

A. Yeah. The, ah, not the, ah, not the headlights, but the light, marker lights, parking lights.

Q. So, the headlights were on?

A. No, the headlights wasn't on. It was the parking lights.

Q. The little yellow ones?

A. Yeah.

Q. The warning lights?

A. Yeah, on the side.

Q. And which way had you all come in? If you look over here to this diagram, down to the end is across the railroad tracks is apparently where you enter, is that correct?

A. Yeah, it's only one (1) way in there.

Q. Okay.

A. And one (1) way out.

Q. And where did you go after you went in?

A. Ah, there was a big stack of railroad ties and stuff and that's all I remember.

Q. If I could just show you Commonwealth's Exhibits Thirty (30), Twenty-nine (29), and I'm sorry, I

can't tell if it's Twenty-eight (28) or Thirty-eight (38), photographs of that area in the daylight. Do you recognize anything in these pictures?

A. Well, I thought it was railroad ties, but, yeah, the house.

Q. Okay. Would you point it out to the jury, the house on Number Thirty (30)?

A. Yeah. (Pointing).

Q. And this big stack -

A. Yes.

Q. Is what you call the railroad ties?

A. Yes, it was dark really.

Q. Now, whereabouts did you have the car?

A. Ah, it would be back this way (pointing). Back towards there.

Q. Okay. If you look in this picture, Number Twenty-nine (29).

MR. SCHWAB: Do you need to see this?

MR. TUCK: I'd like to. The witness is being examined and I have a right to see which, where he's at, and what he's -

THE COURT: You can have a, you can look at it. Go ahead.

A. Okay. It was back this way somewhere (pointing).

Q. All right. The house would be down here or the -

A. Yeah.

Q. Or the train station, whatever?

A. Yeah, it was across there.

Q. And were you all in one side of the car?

A. Yeah.

Q. Which side was that?

A. That, ah, that would be the driver's side. Once we'd all got out.

Q. What happened after you got out?

A. Ah, Mark told him to walk and, ah, (pausing) and Ben told him to take his clothes off.

Q. Did he take his clothes off?

A. Down to his underwear and his socks.

Q. What happened to his clothes?

A. They got threw in a river.

Q. What happened to him there after he took them off, if you know?

A. At the time, I thought it was funny. I guess we all did, and, ah, -

MR. JENKINS: Well, Your Honor, we object to him speculating on what the other people thought it was.

A. Ah, -

THE COURT: Yes, but I mean he can certainly testify to what -

MR. JENKINS: Said it was funny as far as he was concerned.

A. Basically, him agreeing though.

THE COURT: To, he would testify to what he felt.

MR. JENKINS: I was making an objection, son, to the Court.

THE COURT: Go ahead and answer the question that was asked, but just limit your answer to your feeling.

A. Ah, well, all right, I thought it was sort

of funny and, ah, because he'd have to walk to a, to find a phone in his underwear and his socks, I mean.

Q. Now, did you have any conversation with him before Mark told him to go on or Ben told him to take his clothes off?

A. I don't recall.

Q. And which way was he walking?

A. Ah, towards, ah, the same way we came in, that way. There's only one (1) way out and one (1) way in.

Q. All right. And how far had he walked after his clothes were taken off?

A. Fifty (50) yards or so, or fifty (50) feet or so, I'm not sure. It wasn't far.

Q. And after he started walking, what did you do?

A. I got in the driver's seat of the, of the car.

Q. And what did Mark do?

A. He got in the passenger's seat.

Q. What did Ben do?

A. Ben got in the back and he told Mark to give him the pistol back and he got out of the car and run up to him (pausing) and he turned him around and shot him.

Q. Did you hear the gun shot?

A. No, I seen flashes.

Q. One (1) or more?

A. More.

Q. And what happened to this person as the flashes went?

A. I saw him throw up his arm (describing).

Q. And then what?

A. (Pausing) Fell on the ground. Just staggered back and fell on the ground.

Q. Did Ben come back to the car?

A. Yeah.

Q. Right away or did he delay?

A. Came back to the car.

Q. And where did he get in?

A. In the, back in the back.

Q. And after he got inside, was anything

said?

A. Yeah.

Q. And what was said?

A. Me and Mark was asking him why did he do it back and forth and he said - because I've bee. in the penitentiary and I ain't going back. He said that boy saw his face.

Q. Did you leave this area right away?

A. Yeah.

Q. Who was driving?

A. I was.

Q. And where did you go?

A. It was some back roads. We winded, well, we went to the river first down in McCoy.

Q. Did Benjamin Lilly say anything else there at the scene other than what you testified to?

A. As we started moving the car a little bit and as the car started moving some he, he asked, he said, - give me a fuckin' beer.

Q. You went on down the road?

A. Yeah.

Q. Did you ever get any beer?

A. Yeah.

Q. And where did you do that?

A. Ah, with the money that, that, that guy had gave Ben. He went into the store. That -

Q. Did you and Mark go in?

A. No.

Q. And what did Ben come out with?

A. He come out with ah, I don't remember if it was a twelve (12) pack or a case and a pack of cigarettes.

Q. What kind of beer, if you remember?

A. Busch Light, or Busch, one of the two.

Q. Who was driving then?

A. I was.

Q. And where did you go from the store with the beer?

A. Down to the river, down to McCoy River.

Q. And what did you do down there?

A. Threw away anything that might have our prints on it.

A. It was all three (3) of us.

Q. So, at that point, you had the vehicle, you had the beer. Did you still have all three (3) guns?

A. Yes.

Q. Had you gotten rid of those?

A. No, we still had all three (3) guns.

Q. And who drove away from that place?

A. I did.

Q. And where did you drive to?

A. To the first store that got robbed.

Q. Is that over in Giles County?

A. Yeah.

Q. Okay. Who went, where was everyone else in the car?

A. Mark was still in the passenger's seat and I was driving and Ben was in the back.

Q. Okay. And what happened as you got to the store?

A. Well, at first we passed it and then turned around and went back and, ah, we was arguing on who was going to carry the gun in.

Q. Now, why would you want to carry the gun in?

A. We was going to rob it?

Q. Why were you going to rob it?

A. To get money to get out of town.

Q. Did you have any money with you?

A. No, not that I remember.

Q. Do you know if Mark had any?

A. No, I don't think so.

Q. Did Ben indicate whether he had any other than what he bought the beer with?

A. If it was any change off of it, that would be all he had.

Q. Where did you all park in relation to the store?

A. Right out in front of it.

Q. Had you, while you were talking about getting money to get out of town, did you talk about some place to go?

A. Yeah.

Q. And where were you going?

A. Ah, Ben said he knew some people in West Virginia. That we could hide there for a few days.

Q. So, who all ended up going into the store?

A. All three (3) of us.

Q. Do you remember who went in first?

A. Ah, no,

Q. Who ended up carrying the gun?

A. I did.

Q. And why did you take the gun?

A. I really don't know. I don't know.

Q. Did Ben say anything about taking the gun inside?

A. Yeah, he said he did what he had to do already. Something in that area.

Q. So, you all three (3) went inside?

A. Yes.

Q. What did you do?

A. Ah, took the gun and showed it to them and told them to give up the money.

Q. And when you said them, there was more than two (2) people in the store?

A. No, the guy had to get back off of the floor and open it.

Q. And the cash register came open?

A. Yeah.

Q. And who took the things out of it?

A. Mark.

Q. You still had the pistol?

A. Yes.

Q. Did you still have it out?

A. Yes.

Q. And did you take anything?

A. Ah, ah, the, ah, the stereo.

Q. Okay. The little radio -

A. Yeah.

Q. Boombox?

A. Yeah.

Q. What else besides what was in the cash register did you all take there?

A. Ah, some more beer and some gloves and stuff. I don't remember exactly what all it was.

Q. Were the gloves on a display?

up. What did you do with yours?

A. I stuck it in my front pocket.

Q. And where did you go from there?

A. Ah, to the next store.

Q. Was that in Pembroke?

A. Ah, yeah. Ah, Bill Williams' store.

Q. It's sort of right there on the main road?

A. Yeah.

Q. You pulled in, and where did you park?

A. Ah, we were, well, out front.

Q. Okay. And what happened after you got there?

A. Ah, we all got out and, ah, again we was arguing who was going to do it and, ah, I said, you know, I'll do it, you know, basically, so I grabbed the pistol again and Ben got under the driver's seat and me and Mark went in the store.

Q. And what happened when you went in the store?

A. Ah, I took the gun out and I told her to give me the money.

Q. And there was a woman working?

A. Yeah.

Q. And did she give you the money?

A. No.

Q. Did she tell you why she wouldn't give you the money?

A. She said they didn't have any.

Q. And who else was in there with you?

A. Mark.

Q. Where did you have the pistol?

A. Out in front.

Q. In your hand?

A. Yeah.

Q. And then what happened?

A. Ah, Bill Williams came into the store and grabbed me.

Q. From behind, the side or the front?

A. From behind, from like my side, he rushed me.

Q. And then what happened?

A. I, I got loose from him and, ah, and, ah,

she said, - here take it - and she threw a bag of quarters or some, a whole bunch of change onto the counter and we grabbed it and run out of the store.

Q. Now, these coins, were they in wrappers?

A. Yeah.

Q. Like they come from the bank?

A. Yeah.

Q. After you got loose from Mr. Williams, did you tell him anything?

A. No, not that I recall.

Q. Did you do anything with the pistol at that point?

A. No, not that I recall.

Q. You ran outside and then what?

A. Ah, jumped in the car and, ah, that's when, when it tore up a little ways below the store.

Q. And this is the car you got from the convenience store in Blacksburg?

A. Yes.

Q. Then where did you jump in the car?

A. I jumped in the back that time and Mark

was in the passenger and Ben was driving.

Q. All right. And who grabbed the change inside?

A. I don't remember if it was me or Mark.

Q. And you got in the car?

A. Yeah, and, ah, -

Q. Where did you go from there?

A. To where it tore up across the bridge, Pembroke bridge.

Q. Was there anyone behind you?

A. Yeah, Bill Williams. The reason I know it was him because the car was sitting in the parking lot the one, the one that we went and robbed, when we started to rob the store. I recognized it when it got behind us.

Q. And how far did it follow you?

A. It, it got, it was following us across the bridge.

Q. Did you do anything about it following you?

A. Yeah, I took the rifle, I was in the back of the seat and I took the rifle and I pointed it out the

window, pointed it up into the air and fired to let him know we had guns and, ah, he backed off.

Q. How much further did you go before the car stopped?

A. Not far.

Q. Now, did you, did the car stop on its own or did it have some kind of problem?

A. It, ah, it, ah, I guess the engine locked up. It just stopped on us.

Q. What did you do with the car?

A. We was getting stuff out of it, ah, and Randy Tilley came around the corner and Mark run over the hill and I run over the hill and I was, and, ah, I thought Ben was behind us, but he wasn't and I fell onto some rocks and Mark kept going and I set up on a rock and I seen them arresting Ben.

Q. Now, you said you were getting things out of the car?

A. Yeah.

Q. What were you getting out the car?

A. The stereo and the beer and stuff.

Q. Could you see where the car was?

A. Yeah, I could see them walking back and forth past it.

Q. And you saw Mark, I mean you saw Benjamin?

A. Yeah, I saw them arresting him.

Q. Where was he when you first noticed him?

A. He was standing beside the, on the passenger's side of the car at that time and he had his hands in the air and they made him drop to his knees.

Q. How long did you stay there?

A. Till they got me.

Q. Do you know how long that was?

A. Nah, five (5) or ten (10) minutes.

Q. Could you see all the officers?

A. Yeah, I watched them walk back and forth past me.

Q. Were their headlights on?

A. Yeah, and the blue lights and everything else.

Q. And how did you end up in custody?

A. Ah, one of them had heard me.

Q. Heard you what?

A. Ah, ah, I was sending a message to my Mom.

Q. How were you sending a message to your Mom?

A. I was, just, just told them to tell my Mom I loved her and that was it. I had the gun in my mouth. I was going -

Q. That was the deer rifle?

A. Yes.

Q. Were you still sitting?

A. Yes.

Q. And where was the butt of the gun?

A. It was at my feet.

Q. And the top was in your mouth?

A. Yes.

Q. Was the hammer cocked?

A. Yes.

Q. You didn't pull the trigger?

A. No.

Q. Why did you want to pull the trigger?

A. (Pausing) From what I seen and, and, and,

and for what I did.

Q. Why didn't you pull the trigger?

A. Because something deep down was telling me that, ah, that if I, if I had of then they would have just put it on me and all of it on me and, you know, I didn't want my family to hate me, you know.

Q. So, you put the rifle down or threw it down?

A. Yeah, I threw it behind me.

Q. Now, when you were out there, did you hear, did the police have loud speakers?

A. Yes.

Q. Did you hear them calling out names?

A. Yeah.

Q. Did they call out your name?

A. No.

Q. Did they call out Mark Lilly's name?

A. No.

Q. Do you remember any of the names they called out?

A. Yeah. They called out ah, ah, ah,

scene where the car broke down?

A. No. They, ah, they, ah, brought him in last. They found him walking on the side of the road and I didn't see him until early the next morning.

Q. All right. Did you agree to talk to the police?

A. Yeah.

Q. And you said, is that what you meant by upstairs?

A. Yeah.

Q. And you spoke with Lieutenant Price, is that right?

A. Yes.

Q. And what did he ask you about?

A. He just asked us what happened, asked me what happened and, that night, what was going on.

Q. Did you tell him anything about the names they were calling out?

A. Yeah, they asked me was that who I was with and I told them, no. I told them I was with Mark and Ben Lilly.

A. Yes, sir.

Q. At that point in time, did you point the gun at A. J. Falls?

A. No, sir.

Q. You didn't threaten him that evening?

A. No, sir.

Q. Now, did Ben have any of the weapons when he was at A. J.'s house?

A. Yes, sir.

Q. He did, and you're certain of that?

A. Yes, sir.

Q. Okay. Now, I believe you also indicated that you went down to some trailer parks after you shot the goose, is that correct?

A. Yes, sir.

Q. And then you stopped at a trailer park across from the rock quarry, I believe that's on Jennelle Road, is that correct?

A. Ah, I'm not sure which road it is, but it's -

Q. Across from the rock quarry?

A. Yeah.

Q. And that's in Montgomery County?

A. Ah, yes, sir.

Q. Is it near the road on Holiday Ford?

A. Yes, sir.

Q. Okay. So, if that was Jennelle Road, then that was the road that you were on?

A. Yes, sir.

Q. Okay. Now, did at some point in time during that evening, when you got to that trailer park, did Mark threaten anybody with that firearm, pull it out and pull the hammer back?

A. No, sir.

Q. All right. And you're certain of that?

A. Yes, sir.

Q. Now, did you indicate to A. J. that the property was stolen that was in his home?

A. Yes, A. J. knowed it.

Q. All right. Did you tell him where you had gotten it from?

A. No, sir.

5th?

A. No, sir.

Q. You were not driving Ben's car without Ben being present?

A. No, sir.

Q. You did not tell them, obviously, since you didn't see them that day that you would kill your own best friend and never regret it?

A. No, sir.

Q. Now, let's go to about 6 o'clock. You've indicated that you were out at Cowboys, is that correct?

A. Some, well, I don't remember the exact time, but we at Cowboys, yes.

Q. Was it getting dark?

A. Yes, it was getting dark, yes.

Q. And I believe you indicated that Mark Lilly got out in the car with somebody?

A. Ah, me and Ben got out of the car and, ah, a guy got in the car with Mark.

Q. A guy got in the car with Mark?

A. Yes.

Q. Was his name Ron Lucas?

A. I have no idea.

Q. Don't know what his name was?

A. No, I don't even remember what he looks like.

Q. And you came out there later and pulled out a gun, is that correct?

A. Ah, no, that's not correct. Ah, -

Q. But you did pull out the rifle?

A. Yes, but I didn't come, I, I, I had stated that, ah, that, ah, when we got out of the car and the guy got in the car with Mark, I was showing the rifle to somebody, yes.

Q. Well, Ben didn't come around and tell you to put those damn guns away and take the rifle away and put it in the trunk?

A. Definitely not.

Q. Definitely not. Now, the prosector asked you, did Bill Williams, did you say anything to Bill Williams, did you do anything with the gun? This is over at the store over in Pembroke, the second robbery, and I

believe you indicated that you didn't, is that correct?

A. Yes, sir.

Q. You didn't tell him that you would blow his head off, did you?

A. No, sir.

Q. Didn't point the gun at his forehead, did you?

A. No, sir. I was waiving it around, but I wasn't -

Q. You never pointed it at him or never told him you would blow his head off?

A. No, sir.

Q. Now, did you ever state to, do you know who Bo Hutchinson is? Clarence Hutchinson?

A. Ah, yeah, I was in jail with Bo a while back, a good while back.

Q. About a year ago?

A. Ah, way over a year, yeah.

Q. Okay. Did you tell him that you would be coming back to prison for murder?

A. No, I sure didn't.

you shaking, excited?

A. That's the first store, isn't it?

Q. The first store, Eggleston.

A. Yeah, ah, well, I was yelling. Ah, I was excited. It was -

Q. Were you pointing the gun at him?

A. I, I do not remember. Ah, I may have.

Q. You may have. You don't remember pointing the gun at him?

A. No, no, not directly at him, no. I remember -

Q. Do you remember -

A. Holding it out. I knew they seen me.

Q. You knew they seen you. You were holding it out because you were robbing the store?

A. Yeah. Well, I, I had him lay on the -

Q. You had him, had him lay on the floor?

A. I had him lay on the floor and, ah, ah, you know, I couldn't see him no more and he couldn't see me either, so, you know, -

Q. But you, you didn't tell him not to look

Q. With the gun in, in your mouth?

A. Yeah.

Q. And they heard you talking to your, about your Mom or to -

A. Ah, somebody came by. One of the cops that was walking through and I said, you know, something like - Tell my Mom I'm sorry or something like that, you know, and or I love her, or something like that, and then about, I don't know, twenty (20) or thirty (30) of them pointed guns at me and told me to put that one down and kind of woke me up a little.

Q. And you threw the gun away?

A. Yeah, I threw it behind me.

Q. After the put the twenty (20) or thirty (30) guns on you?

A. Yeah.

Q. Okay.

A. I didn't have a standoff with them.

Q. Well, you had a rifle with a scope on it, is that right?

A. But it was in my mouth. It never was

pointed in their direction.

Q. Right.

A. Never. Even when I threw it I made sure it wasn't pointed that way.

Q. The gun wasn't pointed that way. I believe you indicated you in your reports that Ben Lilly went right up into Alexander Defilippis' face, is that right, and shot him -

A. Yeah.

Q. At point blank range?

A. Yeah. Right, right at him, yes. From me to you. Ever bit of it.

Q. All right. If not closer, is that right?

A. Yeah, I guess, a little, a arm, a little over a arm length -

Q. All right.

A. And then the gun length, you know.

Q. Now, was this real close to the car?

A. Ah, it wasn't real far, but it wasn't real close. I, like I said, it was, it was, it was close, but, you know.

Q. All right. Did you hear what he said?

A. Yes, I did.

Q. Would you tell the jury what he said over the loud speaker?

A. He kept calling his brother by name and said, Mark, you know, come on out, you know, don't let them kill you. You're not the one that's really in trouble here. You're not the one that's, or the one that's really done anything wrong.

Q. All right. And that was said by Ben Lilly over the loud speaker?

A. Yes, it was.

Q. Now, Mark wasn't located in that area, was he?

A. No, he was not.

Q. Thank you. Answer any questions defense counsel may have.

THE COURT: Mr. Jenkins.

CROSS-EXAMINATION

BY MR. JENKINS:

Q. Ah, Officer Wilburn, now, do I understand

Q. All right. And then what did you do?

A. Well, he, he said something to prompt me to ask and I said what does a murderer look like anyway. I don't recall exactly what he said, but it, that lead to that question.

Q. And did he make a response to that?

A. And he said that, ah, he set back in the car again and he said, me.

Q. Did he say it loudly?

A. He, he said it loudly enough to where I could understand what he, it sounded like he said me to me.

Q. All right. And after you heard that, what did you do?

A. I said that, ah, I asked him what did he say? And he said that, ah, he was going to hell to meet his brother.

Q. Did he tell you why he thought his brother may be in hell?

A. Ah, he said that his brother committed suicide some eight years earlier. It was that, a matter

well as your grounds and argument, Mr. Tuck.

MR. TUCK: Your Honor, we believe that the Commonwealth will be calling Mark Lilly to the stand. He may or may not take the Fifth Amendment because some of his statements might incriminate him. That question, if he does not take the stand, it is our understanding that the Commonwealth intends to simply introduce transcripts that conspired or, between police officers and statements made by Mark Lilly. We believe that it's, if that is done that that will violate the confrontation clause of the Sixth Amendment as guaranteed to all citizens through the Fourteenth Amendment of the United States Constitution. Ben Lilly has a right to look at his accusers in the face and the jury has the ability to look at his accusers in the face and see, and, and the jury has the ability to look at that person and see if they're telling the truth. Clearly, if that is done, these statements are entered, then he will not have the ability to confront his accusers. Your Honor, we will not have the ability to ask Mark Lilly why he says that the shooting took place ten to fifteen yards away and

Gary Barker said they took place point blank. I won't have anybody to cross-examine. Your Honor, he indicates in one of his statements that he had money in his pocket and he could have paid for the beer that was done and that he didn't need to rob it. But in the other statement that he gives to Officer Hamlin, he says, no, I don't have, I, we, were broke. Clearly, these statements have inconsistencies. They are self-serving as well. If you look at the motion that I filed with the Court, he indicates he was so drunk he doesn't remember. That it wasn't he, ah, that, ah, did anything wrong, it was Gary Barker and Ben Lilly doing things wrong throughout the course of this evening. He says he was so drunk he doesn't remember. At any key point, did you know that they were going to go in and rob it? No, it, or it was their decision. I had money to pay for it. Did you know, did you handle the guns that evening? No, and the Court's already seen evidence that the pistol was seventy-five feet down behind the car. It had to get there somewhere, Your Honor, and Gary Barker has already testified that he didn't take it down there, so this is

another inconsistency with Mark Lilly's statements. Mark Lilly is trying to put himself off as just a, a, being intoxicated and not doing anything wrong in this case whatsoever. That is not an acceptable, ah, exclusion for a, the confrontation clause. It has to be against his own penal interest and the statements that he has given put him far away from the crime. They do not talk about the fact that he did. What did he do in Montgomery County? Well, I had to get in the car because I was so drunk. I didn't want to get left behind. Not that I knew what was going on. Which is totally inconsistent with what Gary Barker's testimony has been, and, Your Honor, I won't have anybody to cross-examine and he has that right based on the Sixth Amendment and when he gets in that stand, we won't be able to cross-examine and that's why it's so important to our system for the, when the, a jury to look at that witness and be able to say, there's discrepancies in their testimony. I won't be able to ask Mark Lilly, did you possess this money clip? I won't be able to do that because I don't have the right to confront him. My client has been denied that right if

the Court rules against us. That's why it's so important. We're talking about a murder trial and we're talking about whether a man lives or dies. This is not a shoplifting case and I am asking this Court, I am imploring this Court allow us the right to confront the witness and if we don't have that right, then to keep the statements out. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. Let me ask you a question. What is your argument if Mr. Lilly, I'm talking about Mark Lilly, -

MR. TUCK: Yes, Your Honor.

THE COURT: If he is available, the Commonwealth calls him as a witness, he is sworn, he is seated in the witness chair, and then he takes the Fifth Amendment against self-incrimination. Where is your argument as to whether such circumstances make him unavailable?

MR. TUCK: According to Virginia case law and Federal case law, that would make him or deem him to be unavailable. However, Your Honor, we believe that, frankly, we believe that the Virginia State Supreme Court

is wrong. It ruled in it's evidence that this, the whole statement could come in. Not just the statements against their penal interest, but the whole statement. If you look at the way the Federal courts interpret their own rules of evidence and the way that they have interpreted the confrontation clause, they only are allowed to look at the statements that incriminate them and if they get up, because that's where the reliability is. If Mark Lilly would have gotten up and said, I did something wrong here, that portion of the statement can come in. I did something wrong, but that's not what, that's not what the Commonwealth I, we believe again, that's not why they're going to be offering it. They're going to want to be offering it for the truth of the matter that Ben Lilly did something wrong and when that is done, we're talking about how, how, anything I say, if I got up in my opening argument or in closing argument and say, Mark Lilly says it's thirty, ten yards, fifteen yards, that would be thirty to forty-five feet and Gary Barker says that it's, ah, ah, point blank range. Your Honor, I don't have anybody to cross-examine. Anything that I say

is not evidence. I don't have anybody, any way of pointing that out because there is no one on the stand for me to cross-examine.

THE COURT: Thank you, Mr. Tuck.

MR. JENKINS: Your Honor, could I just give the Court a couple of cases I think will be on -

THE COURT: Mr. Tuck may insofar as this motion is concerned.

MR. TUCK: Your Honor, I -

MR. JENKINS: Okay.

MR. TUCK: Omitted just for the record Douglas v. Alabama, -

THE COURT: And that has already been submitted and reviewed by the Court -

MR. TUCK: I believe that's correct. Brutan v. United States -

THE COURT: That has been submitted and reviewed by the Court.

MR. TUCK: I believe Crews v. New York. I also believe I had submitted to the Court two other cases. That was an Idaho v. Wright and just to

briefly discuss Idaho v. Wright, Your Honor, while we're talking about some of the case law, that case was, involves a rule in Idaho that said there is a general hearsay that if it's reliable, the Court can have, let it in. And the Supreme Court said that's not a well-founded reason. One of the defendants objected as to hearsay. That defendant is still incarcerated. The other defendant objected as to the Sixth Amendment right to confrontation. The Supreme Court overturned that person's conviction is my understanding.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any response to the defense's argument?

MR. SCHWAB: Well, Your Honor, assuming that Mark Lilly will be unavailable because he takes the Fifth Amendment, his Fifth Amendment rights and refuses to be compelled to testify on matters that may incriminate him. The Commonwealth's view of the law is that while the defendant has a Sixth Amendment right it has been consistently held that that right does not override everything else, including and mentioned

specifically in the Idaho v. Wright that it doesn't override and they have refused to say that it will override other exceptions in evidence. They, the rule essentially is that evidence primarily of co-defendants in this case, well, let me back up, the rule is, matters may come in the Court that would violate the Sixth Amendment Confrontation Right if there is, in their terms, a well-rooted basis for admission of hearsay and that was pointed out several times in the Idaho case because the Idaho case involved a statutory residual hearsay. That's what the case was about as the Court knows. That's what the argument was over and the Supreme Court of the United States in that case held that residual hearsay was not sufficient enough to be what they called a well-rooted exception to the hearsay rule. In this case, it has been held for years and years in this jurisdiction as well as others and as Mr. Tuck pointed out, it is admissible even under the Federal Rules of Evidence for statements against penal interest. We would submit to the Court that that is a well-rooted basis for admission of hearsay. The Virginia Rule is

that the whole statement can come in. The Court has seen in the Scaggs case and the Chandler case which discussed what part could come in and whether or not it was incriminating and what made it against a person's penal interest. It didn't have to be a full confession essentially as long as it put them in jeopardy of prosecution. That being the case, it would appear that if he is unavailable, there is an exception to the hearsay which would allow those statements in and that it would not violate his constitutional rights based on the current status of the law. As far as I can tell, the U. S. Supreme Court has never had the issue nor made a ruling on whether or not a state well-rooted basis for admission of statements by an unavailable declarant concerning their penal interest is or is not a well-rooted matter. Certainly they had something in mind when they used that term and those would, one would assume from the cases below, from the Virginia cases on that point that, in fact, that's what they were looking to and while the case the defense has cited concerning the Federal Rules of Evidence, it did mention the

confrontation clause and if I remember correctly, they ruled only that part of the statement could come in under the Federal Rules of hearsay. They did not make the Federal Rules of Evidence due process requirements upon all the states of the United States of America. Only in their Courts where their rules were they said that's the rule they will use and how they will allow the information in concerning that hearsay exception and the current state of the law is that it's admissible and one other thing I'd like to say, Judge, that I'm sorry that the law of this Commonwealth should be different for murderers than for shoplifters, but I believe it should be the same no matter what the case is and it should not be argued or ruled upon by the Court simply because it's a murder case rather than a shoplifting, you ignore the current state of the law.

THE COURT: All right, Mr. Schwab. Let me ask you the same question that I asked Mr. Tuck. What is your argument as to whether or not Mark Lilly is available if, in fact he's sworn, takes the witness stand and responds, ah, by taking the Fifth Amendment against

self-incrimination. What is your opinion as to whether or not in terms of Virginia president, precedent that he is available or unavailable?

MR. SCHWAB: I cannot point to anything in the two cases I provided you, but it is my understanding of the law that one of the ways, although it may have been in FRIEND, I believe, noted with a citation that if a person does take the Fifth Amendment and cannot be compelled to testify, then that person is unavailable, ah, for testimony.

THE COURT: All right, sir. Thank you. Mr. Tuck, you have the burden on this motion, so I'll let you -

MR. TUCK: Your Honor, actually I believe that you, I, while we're making the Motion in Limine, I believe the burden always remains on the Commonwealth.

THE COURT: Well, the burden is on the Commonwealth, but what I meant to say is you, you are making this motion.

MR. TUCK: Your Honor, one of the

points that the Commonwealth brought up is this declaration against penal interest. Where is this a self-serving statement? Look at the, we're here for a charge of capital murder, abduction, robbery. Look at the statements as to those events and it don't incriminate him. He says he goes along just because he was drunk and didn't want to be left behind. He really didn't know what he was doing. Look at the statements that he gave. Is that the same reliability that the Commonwealth that, that even the Virginia Supreme Court cases have said, there has to be some reliability here before we're going to let a hearsay statement in and trample over the defendant's rights and when you start looking at the, he made statements, he didn't, ah, he can't remember if he had any guns or not because he was too drunk. Ah, he gives, we know that at one point in time that he, he mentions that the fact that he didn't indicate he wanted to commit any robberies. That it was just they wanted to do it. He, he keeps pushing the blame away from himself and that's not a declaration against the penal interest. That's a self-serving

statement. Now, the Commonwealth may argue, well, just because he's drunk doesn't mean that he wouldn't be an accomplice, but if someone is unconscious or because he indicates that he was blacking out that might make, that might be a defense. Clearly, Your Honor, as I stated earlier, we believe that this would be a violation of his rights and this is an important right. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. We'll be in recess for about ten minutes to consider your arguments.

MR. JENKINS: Your Honor, you'll be back by yourself, is that correct, in considering it?

THE COURT: Yes, sir.

MR. JENKINS: I'm going to make a telephone call.

THE COURT: Without any coaching from the principals in this matter.

MR. JENKINS: Thank you, Judge.

MR. TUCK: Thank you.

BAILIFF WEAVER: Everyone rise.

Courtroom until the jury gets out.

THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the

hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

MR. TUCK: Your Honor, we would note our objections based on the Sixth, Eighth and Fourteenth Amendments based on the grounds that I have already stated. We would also, it's my understanding that the Commonwealth will be playing the tapes. If the Court would, and I believe the Commonwealth would agree, we do have copies of the transcripts of these tapes. We were, they were never in the Commonwealth Attorney's file and they were not provided to us under discovery, the tapes themselves, and we would object to the tapes being played before the jury because we did not receive them and based on Brady I believe we are required to receive them and we would ask the Court not to allow them into evidence.

THE COURT: All right, sir. What I will do, Mr. Tuck, is allow you time to review the transcript.

MR. TUCK: Your Honor, the transcripts is one thing, but the voice inflections as far as on the tape they may have been exculpatory, they may be exculpatory, I don't know. The Commonwealth I do not believe ever had these in his possession, but as the

THE COURT: All right, gentlemen, we need to set up a place in which you can review those tapes.

MR. TUCK: Is that part -

MR. SCHWAB: The tapes and a speaker are available and the witnesses are in the next room.

THE COURT: All right. Is the speaker and the tapes, I mean the speaker, -

MR. SCHWAB: Yes, but considering the proximity to the jury it might be better if they meet some place else.

THE COURT: What about the attorneys' lounge?

MR. TUCK: Why don't we use one of the rooms over here or the lawyers' lounge. That would be fine, Your Honor.

THE COURT: That would be fine or you can do it in Mrs. Cole office and obviously we want be a party, but I imagine the lawyers' lounge would be more appropriate. All right, Mr. Schwab, would you make them available -

THE COURT: All right, Mr. Clerk.

CLERK: Do you swear the evidence and testimony you give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

MARK LILLY: Yes.

THE COURT: Thank you, sir. Have a seat there, please, and answer questions on behalf of the Commonwealth and questions on behalf of the defense.

MARK LILLY,

A WITNESS OF LAWFUL AGE, AFTER FIRST BEING DULY SWORN, DEPOSED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. SCHWAB:

Q. Would you tell the judge and the jury your name, please?

A. Mark Lilly.

Q. Mr. Lilly, I want to direct your attention to December the 4th and 5th of last year. Were you with Benjamin Lilly and Gary Barker?

A. I'd like to take the Fifth on that.

Q. Did you, don't wish to answer any questions?

A. Yeah, I'll take the Fifth.

Q. Thank you.

THE COURT: All right. Any questions based upon his response?

MR. JENKINS: Your Honor, we, would you be willing to answer questions for the defense?

A. No, I'd have to take the Fifth.

THE COURT: All right, sir. Anything else, Mr. Schwab?

MR. SCHWAB: Not for this witness, Your Honor.

THE COURT: All right, sir. If the jury would go out just a moment, please. Y'all will lose five pounds this afternoon from, from your exercise.

THE COURT: All right, gentlemen, by Mr. Mark Lilly's assertion of his Fifth Amendment Rights, after having been sworn and after having taken the witness stand and assuming the protection of those rights, then the Court does find that the Commonwealth

Case# 950789 &
950790

Interview With
Mark Anthony Lilly
December 6, 1995
At the Giles County Sheriff's Office

Interviewer: Lieutenant Gary Price

Interview With
Mark Anthony Lilly

Interviewer: Lieutenant Gary Price
Date: December 6, 1995
Time: 1:35 AM

G.P. State your full name.

M.L. Mark Anthony Lilly.

G.P. Okay Mark, you need to speak up just a little bit cause I can't hear very well. Mark Anthony Lilly?

M.L. Yeah.

G.P. Spell your last name.

M.L. L*I*L*L*Y

G.P. What is your mailing address, Mark?

M.L. Post Office Box 217, Riner Virginia.

G.P. What's your date of birth?

M.L. 6/28/75.

G.P. And your social security?

M.L. 232-08-. . .

G.P. Whoa, whoa, whoa.

M.L. 232-08-3596.

G.P. 232-08-35967

M.L. Yeah.

G.P. Mark I brought you in the interview room about ten minutes ago and advised you I'd like to ask you some questions concerning some incidents that took place tonight in our county. And you initially said that you

felt like you were still under the influence and that you were not feeling very well. We went downstairs, you asked for some water, and received ice water, and during that time you tell me now that you feel like that. . .

M.L. Well, I'm not.

G.P. that you're in your facilities where you understand and you don't feel too drunk to talk to me. You understand the things that I'm gonna ask about. First off, I'm gonna read the Miranda rights that you have to you, and I want to make sure you feel like you understand these.

M.L. Alright.

G.P. **You have the right to remain silent. That means you don't have to talk to me if you don't want too. Anything that do you tell me, I can and will use against you in the court of law if there is charges brought against you. You have the right to talk with an attorney and have him or her present with you while you are being questioned. And if you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. You can decide at any time to exercise these rights and not answer any further questions or make any further statements. In other words, you got a right to have a lawyer here with you. If you can't afford one, the court appoint one, and if you decide to waive your rights and talk to me, then you can still stop at any time you want too. You understand these rights?**

M.L. Uh huh.

G.P. I'm sorry, you do understand them?

M.L. Yeah.

G.P. Alright, listen to this very carefully. **Having been advised and fully understanding my rights do freely and voluntarily, without threats, promises, pressure, or coercing agree to talk with Gary Price, that's me, a law enforcement officer.** In other words, if you agree to answer questions, it's not because I'm making you do it, I'm not threatening you, you're gonna do it on your own free will. Do you understand that?

M.L. ****No Statement Made****

G.P. If you would, say yes or no.

M.L. Yeah.

G.P. Are you willing to answer questions concerning two armed robberies that occurred in Giles County tonight and incidents that led up in Blacksburg and Montgomery County earlier today, or earlier on December the fifth?

M.L. Yeah.

G.P. When was the last time you had a drink?

M.L. Well, ah. . .

G.P. It's right now, 1:30.

M.L. About dark.

G.P. About dark, which would have been about five or six o'clock. So we're talking about seven and a half hours.

M.L. We'd been drinking liquor all day, since yesterday.

G.P. When you say "we" who are you talking about "we"?

M.L. Me, Ben and Gary.

G.P. Who's Ben now?

M.L. That's my brother.

G.P. Ben Lilly?

M.L. Yeah.

G.P. And Gary, who's Gary?

M.L. Barker.

G.P. You any kin to Gary Barker?

M.L. No.

G.P. I'm going to ask you, if you would, these are the rights that I read you, and then I asked you if you understood these rights and was willing to waive them and you said that you were, and that you did understand them. If you

would sign that. That tells me, the court, the judge, whoever, that I did read the rights to you and that you understood them and agreed to waive and answer some questions. I will ask you, that if you do agree to talk with me, that you answer all of my questions truthfully.

M.L. Yeah.

G.P. Because you indicated that what has happened tonight is very bad, but you would like to talk about it. And at least offer the court the fact that you did own up to it and was willing to take responsibility for what occurred. So, if you're not completely truthful with me, then the court's just not gonna look at this confession or statement as it should. When did you and your brother Ben and Gary, when did ya'll get together today?

M.L. We've been together a few days. Well, me and Gary has, that's my brother's buddy. We run around together all the time.

G.P. Alright, on this day particularly, and when I say "this day" I'm talking about what is now yesterday, December the 5th which was Tuesday. What time did ya'll get together yesterday?

M.L. Well, we was together all day, cause Ben stayed over at our place.

G.P. Okay. When you say "our place" where is "our place"?

M.L. Over in Blacksburg.

G.P. Where about's in Blacksburg?

M.L. (Not understandable) Court Trailer Park.

G.P. Okay. What time did ya'll leave that residence this morning?

M.L. I have no idea. I'd say it was about, man, I don't really know. Besides, I've been drunk all day, I was drunk when I got up.

G.P. What have you been drinking today?

M.L. Liquor.

G.P. What kind of liquor?

M.L. Vodka, Evan Williams, Jim Beam, little bit of everything.

G.P. Did ya'll buy that different kind of liquor, or how did you come across that liquor?

M.L. They got it out of the house.

G.P. And when you say "they got it out of a house", who are you talking about "they"?

M.L. Ben.

G.P. Talking about Ben and who else?

M.L. Lilly, just Ben.

G.P. Just Ben, or Gary was with them?

M.L. Well the house (not understandable) we was all on it.

G.P. Where's the house located?

M.L. Somewhere up in Floyd is all I can tell ya.

G.P. Was that yesterday?

M.L. Day before or something.

G.P. Now, when we, was it a residence or was it a store?

M.L. Residence.

G.P. So you went to a residence, you got the liquor out, and what else did you get?

M.L. I don't, I don't really know, you know, everything that was got out cause I was drunk.

G.P. How did they get into the residence?

M.L. Kicked in the door or something.

G.P. Who actually went into the residence and brought the items out?

M.L. All of us.

G.P. So you brought out the liquor, several different bottles and different brands?

M.L. Yeah.

G.P. Any other items you brought out?

M.L. That's all that I brought out, that I cared anything about.

G.P. Okay. Did Gary bring anything out of the house or Ben?

M.L. I think they got some guns or something.

G.P. Do you know what kind of guns they brought out?

M.L. Uh, a shotgun, a rifle and a pistol.

G.P. Okay. What gauge shotgun?

M.L. I don't even know.

G.P. Is it a single shot, double barrel, pump?

M.L. Pump.

G.P. Pump, pump action?

M.L. **No Statement Made**

G.P. And the rifle, what kind of rifle is it?

M.L. I believe it was a .35.

G.P. What kind of action would it have?

M.L. Lever.

G.P. And the pistol, is it automatic, revolver, what kind was it?

M.L. I guess a revolver.

G.P. Do you know what caliber it was?

M.L. A .38.

G.P. And they all came out of a residence of Floyd County?

M.L. **No Statement Made**

G.P. Do you know who's residence it was?

M.L. **No Statement Made**

G.P. What area was it in? I don't know much about Floyd.

M.L. Ah, like on the way to Indian Valley somewhere.

G.P. Okay. On the way to Indian Valley.

M.L. Yeah.

G.P. What kind of house, was it a brick residence, wooden residence, aluminum siding?

M.L. Aluminum siding.

G.P. Do you know what color?

M.L. It was dark.

G.P. Did this happen during daylight hours or after dark?

M.L. After dark.

G.P. No one was at home?

M.L. Everything looked dark anyway, you know, no one was home.

G.P. Okay. Now up until yesterday when ya'll left, all three of you left yesterday in Blacksburg, you say you don't remember about what time that was ya'll left your house or wherever you were staying and started driving around?

M.L. Huh uh.

G.P. Was it daylight?

M.L. Yeah. About the time it started raining, I guess.

G.P. What were ya'll driving around in?

M.L. Thunderbird.

G.P. What kind?

M.L. Thunderbird.

G.P. Who's Thunderbird is it?

M.L. Well, it's a dam Mercury Cougar.

G.P. Mercury Cougar?

M.L. Yeah.

G.P. Who's was it?

M.L. Ben's.

G.P. What color was it?

M.L. Like a copper color.

G.P. Okay. Did ya'll drive it around about all day?

M.L. We drove it around for a while.

G.P. You pretty much stay in Montgomery County with that car?

M.L. Well, we tried to hang down at Floyd where the back roads are, you know. Cause the law don't go on the back roads that much.

G.P. And that was yesterday you're talking about?

M.L. Well, yeah. Yesterday, everyday, you know, we try to stay out on the back roads.

G.P. What become of that Mercury Cougar?

M.L. You know, I don't even know what happened to it. I just

remember stopping at a dam red, the car cutting out at a red light.

G.P. Your car was cutting out at a red light, it just stopped on you?

M.L. Yeah.

G.P. Who was in the car at that time?

M.L Me, Ben and Gary.

G.P. So it was still you and Ben and Gary. . .

M.L. Yeah.

G.P. riding during that time. Do you know about what time of day it was?

M.L. Right after dark.

G.P. Okay. What transpired at that time?

M.L. Well, dude wanted to get him another car.

G.P. Who wanted to get another car?

M.L. Ben.

G.P. Ben?

M.L. Yeah.

G.P. How did ya'll go about getting another car?

M.L. Well. . .

G.P. Just be honest with me.

M.L. we went across the parking lot and dude pulled a gun on this other dude and told him we was taking his car and he was going with us.

G.P. So who pulled the gun on the dude?

M.L. Ben.

G.P. So Ben pulled the gun, which gun did he pull?

M.L. Pistol.

G.P. Same pistol that was got out of the house over in Floyd?

M.L. **No Statement Made**

G.P. Did ya'll know this dude?

M.L. That we. . .

G.P. That you got the car from?

M.L. No. I never go to town.

G.P. So you never seen him before?

M.L. Huh uh.

G.P. So Ben told this guy, said "We're gonna take your car and we're gonna take you with us."? So did all of ya'll load into the car then?

M.L. I had to or get left man, I was so drunk.

G.P. Okay. Who drove this dude's car off?

M.L. Ben.

G.P. Ben drove? Who had been up front with him, the passenger?

M.L. Gary.

G.P. Gary would up front?

M.L. Yeah.

G.P. And then that would put you and whoever this dude was in the back?

M.L. Yeah.

G.P. What happened from that point?

M.L. Well, not much of nothing man, we just rode. I was so dam scared I was sitting up against the door, man. You know, watching everybody.

G.P. Why was you scared, you had the gun didn't you?

M.L. No. I, I didn't have no dam gun, no.

G.P. Okay. So. . .

M.L. That's the first time I ever been through anything like that, you know, I didn't know how to take things, I just sat back.

G.P. Well, what was the dude saying during, I mean, was he scared or, was he asking to be let out or, begging.

M.L. He didn't act like it, he didn't act like he was scared or nothing.

G.P. How old was this boy that had the car?

M.L. Twenty-five maybe.

G.P. Anything that you remember about him? What he was wearing or anything that stood out?

M.L. I don't really remember man, I was drunk.

G.P. So he was in the back seat with you?

M.L. Yeah.

G.P. So you drove, where did ya'll drive to?

M.L. Uh, down like you're going to McCoy maybe.

G.P. So you left the Blacksburg area like you're going toward McCoy? That's what they call Price's Fork Road, White Thorne Area, McCoy down that area, is that the way you went?

M.L. Down through there somewhere. I know about where you're talking about, I just ain't familiar with it, you know.

G.P. What was ya'll going to do, what was the plan to do with, not only the car, but this guy that was in there with you?

M.L. We just needed a ride somewhere.

G.P. Okay. So you rode down toward the McCoy of Falls Area, what transpired after that?

M.L. Well, we drunk us another, another litter of liquor I think, yeah a good litter, and then they said something about wanting to go to Giles County.

G.P. Okay. Who wanted to go to Giles?

M.L. Ben.

G.P. Ben?

M.L. Yeah.

G.P. Okay. What happened then?

M.L. We ended up down here.

G.P. Okay. Anything else happen in between there?

M.L. Nothing that you don't already know, man.

G.P. Alright. I wanna hear your side of it.

M.L. Well. . .

G.P. If you would speak up, I do have a bad time of hearing.

M.L. Me and the blond headed dude, we didn't have nothing to do with shooting him, you know.

G.P. Who's the blond headed dude?

M.L. Gary.

G.P. Okay.

M.L. We didn't have nothing to do with the shooting.

G.P. Alright. Well, tell me about it.

M.L. Well, it's kinda hard cause he's my fucking brother man.

G.P. I know that. And normally I can understand if you don't tell on family members. But when you get down to the fact that he may be dragging you right in to a life time sentence, I think it's time for family ties to be broken. Especially if he done it without. . .

M.L. Is he. . .

G.P. consent of everybody. If ya'll had all said "Yeah, let's all kill him" or something, I think you need to share in it. But now, if a family member done something of this magnitude, and took it upon himself to do it, that's my opinion.

M.L. Yeah.

G.P. And he's your brother, and I understand that. But I think it's. . .

M.L. Well, is he saying that me and that other dude done it?

G.P. Well, I told you to start,

M.L. **Statement Muffled**

G.P. I'm not gonna tell you what each person said.

M.L. Well.

G.P. I simply told you before we started that they said you didn't do it. And all I'm asking you for is what you saw and what you heard. I know it's hard to say things against your family, but I think in this matter, I don't think anybody's gonna hold it against you. And as you said, I know what happened, but I need for you to tell me what happened. It's not an easy thing to talk about.

M.L. How many times was that dude shot?

G.P. I can honestly tell you, I don't know. More than once, I know that, but I do not, it didn't occur in my county so I'm not sure how many times he was shot. I'd have to ask the right people. I know it was more than once. Number one, what happened? Ya'll was going down the road, apparently you stopped.

M.L. Yeah.

G.P. Why did you stop?

M.L. Well we was all gonna get out of the car first.

G.P. Okay.

M.L. Then, Ben, you know, he just freaks out, and says "Fuck this we'll take this dude's car and we'll leave him behind."

G.P. Okay.

M.L. You know, and I'm setting up there, "Goddam what's he gonna do" me and Gary was. And they go over here beside this fucking I guess it's a dump or some fucking something, I don't know, you know, dude shoots him.

G.P. When you say "dude shoots him" which one are you calling a dude here?

M.L. Well, Ben shoots him.

G.P. Talking about your brother, what did he shoot him with?

M.L. Pistol.

G.P. How many times did he shoot him?

M.L. I heard a couple of shots go off, I don't know how many times he hit him.

G.P. Where were you when this was going on?

M.L. In the back seat of the car still yet.

G.P. So you never got out of the car?

M.L. Right.

G.P. Did Gary ever get out of the car?

M.L. Huh uh.

G.P. So Ben stopped, got out of the car, I guess he made whoever the other guy is, that we don't know his name, made him get out of the car?

M.L. **No Statement Made**

G.P. And you thought they was just gonna let him off and then take his car, is that what you thought?

M.L. That's what me and Gary both thought.

G.P. Did you hear an argument between these two or did they wrestle or fight or. . .

M.L. I didn't see no fight man, we had the windows rolled up and music blaring.

G.P. Could they, were they arguing or do you think this guy tried to run or, why do you think Ben would shoot him?

M.L. I don't know, don't know that.

G.P. So, you said Ben shot him, did you see the flash or how do you know Ben shot him, let me ask you that?

M.L. Well, he dropped.

G.P. How far was Ben from him?

M.L. It was about as far as from me to them dudes in there.

G.P. Which was about ten to fifteen feet, you think that's accurate?

M.L. I'd say ten to fifteen yards.

G.P. Ten to fifteen yards. Did anything transpire right before he shot him?

M.L. What do you mean?

G.P. I understand that when they found the body, he didn't have his clothes on. Do you remember anybody telling him to take his clothes off or why he wouldn't had his clothes on?

M.L. I don't know.

G.P. How long had ya'll been stopped before you heard the shots?

M.L. About five minutes maybe.

G.P. And then I guess Ben got back into the car?

M.L. Yeah.

G.P. What was said?

M.L. After he got back in the car?

G.P. **No Statement Made*

M.L. Nothing. I was wanting out, you know, I didn't say nothing to nobody.

G.P. You knew he had shot him?

M.L. Yeah.

G.P. You didn't ask "Why did shoot him?" Or did Gary ask him "Why did you shoot_him?"

M.L. No. Neither one of us said a word.

G.P. Did he offer any reason why he did shoot him?

M.L. Huh uh.

G.P. Up until that time, ya'll were the only four in the car? You, Ben and Gary and this guy?

M.L. Right.

G.P. Did you see anybody else there where ya'll stopped?

M.L. I wasn't really looking for anybody.

G.P. Okay. But apparently you could see well enough to see that this guy was about ten yards or fifteen yards from Ben?

M.L. Yeah, something like that.

G.P. And then you heard, when they fired the shots, were they pow-pow or was there some time in between them?

M.L. Pow-pow, you know.

G.P. Pretty quick?

M.L. Yeah.

G.P. And then he got, did he get back in the car immediately or did he stay outside for awhile?

M.L. Well, he got in, he didn't waste too much time.

G.P. And then he was driving?

M.L. Yeah.

G.P. And then ya'll just pulled off and left?

M.L. Yeah.

G.P. Ya'll didn't check on the guy to see if he was dead or did Ben check on him and say he was dead?

M.L. It scared me man, I wanted to get the hell out of there.

G.P. No, but did Ben say "He's dead"?

M.L. Yeah.

G.P. Ben did say he was dead, so Ben walked back to him you think and checked him?

M.L. I don't know if he walked back but he must have knew something.

G.P. Would he have had enough time, from the time you heard the shots, to have walked back to him and then come back and got in the and drove off?

M.L. Do what now?

G.P. What I'm saying, you said he was about ten or fifteen yards away, would Ben had enough time to shoot him, walk over to him and check to see if he was dead and then come back and get in the car? You said there was a little time period in there from the time you heard the shots

until the time Ben got back into the car. And Ben knew he was dead, Ben told you he was dead. So, apparently Ben had checked him or for some reason thought he was dead.

M.L. Yeah, or he could'a stood there too.

G.P. Did Ben say where he shot him?

M.L. Huh uh. I didn't ask either.

G.P. So ya'll stayed in the car. You were still in the back?

M.L. Yeah.

G.P. What happened from that point?

M.L. What do you mean what happened after that?

G.P. Where did ya'll go after you pulled off and left the body and kept coming towards Giles County.

M.L. Well, we just went riding around drinking beer and liquor.

G.P. Okay.

M.L. We got, we stopped and bought us a case of beer somewhere.

G.P. Okay. Do you remember coming into the M & L or the H & L Mini Mart over, I can tell ya it's in the Eggleston area, I don't know if you know where that is. It's out in the country.

M.L. All of these places out in the country.

G.P. Well, these are even more country than most, but it's a little, bitty, country store. There was an old man and an old woman in it.

M.L. I think I remember something about it.

G.P. What do you remember? You know, here again you're being honest and the story matches, all I'm asking is just continue to be honest. What happened when ya'll stopped at that little country store where the old man and the old woman was running it?

M.L. Uh, well, we went in and first of all, they wanted to rob it and they figured that, Ben figured that he was in deep enough, you know, where he shot that mother fucker, you know. I guess he just thought I ain't got nothing to loose, I'll just rob this bitch (not understandable) money.

G.P. Okay. Who went in the store?

M.L. All of us.

G.P. Did any of you carry any weapons with you?

M.L. One of them had one, I didn't have none.

G.P. You didn't have any weapons with you?

M.L. Huh uh.

G.P. Do you know who carried the weapon in?

M.L. Huh uh, I don't know that.

G.P. What kind of weapon did they carry in?

M.L. Well, the pistol.

G.P. Okay. And what transpired when you got inside? How many people were in there other than ya'll?

M.L. Just the old man and woman.

G.P. Alright, when you got inside, where did you go?

M.L. I just walked, let's see, I think it the aisles like that. . .

G.P. Uh huh.

M.L. and that goes back to the beer. And they up here fucking around, and I go back there and get some beer. You know, and part of what went on, they had robbed this mother fucker, you know. And I just thought, "Hell, a twelve pack of beer ain't gonna hurt nothing." So I just took the beer, I took my twelve pack of beer.

G.P. Okay. You didn't pay for it, you just took it?

M.L. Right. I was so drunk, I don't do that shit, you know, if I'm sober. I had money in my pocket. I figured. .

G.P. Did ya'll, was any money taken from the store that you know of?

M.L. They got some.

G.P. Did you end up with any of it?

M.L. Three ways.

G.P. Okay. Ya'll split it evenly three ways. You know how much your share was?

M.L. It wasn't much man, about a hundred, under a hundred dollars.

G.P. Did ya'll fire any shots in to that store?

M.L. No.

G.P. No shots were fired there, no. . .

M.L. No.

G.P. was the man and woman hurt to your knowledge?

M.L. Not to my knowledge, no.

G.P. Okay. When you went in there, of course, Ben already told "Let's go in there and this store." So you all three went in there, one of them carried a gun, you don't whether it was Ben or whether it was Gary?

M.L. Right.

G.P. Did, what did Gary bring out of it?

M.L. Beer.

G.P. He had beer, did he have anything else?

M.L. I don't know.

G.P. What did Ben bring out?

M.L. I ain't for sure man.

G.P. Alright when ya'll split the money up a little later, who pulled the money out, who had the money?

M.L. It come from the back. This time I was riding up front.

G.P. Okay. So, when you left the store ya'll had a, who was driving when you left?

M.L. Gary.

G.P. Gary was driving and you were up front?

M.L. Yeah.

G.P. And then that would have put Ben in the back?

M.L. Yeah.

G.P. From once you robbed the store, all three of you got back in the vehicle, what did you do then?

M.L. When all three of us got back in the vehicle?

G.P. Uh huh.

M.L. We took off.

G.P. Okay. Did ya'll stop anywhere along the way after that, before you got to the next store?

M.L. Huh uh.

G.P. When did ya'll divide the money up? You said ya'll divided it three ways and it was about a hundred dollars all together.

M.L. Down at the sandbar.

G.P. Okay. That was, of course, that was obviously after you left the store, you already had the money. Then you said the money came from back, so it must have come from Ben, right?

M.L. **No Statement Made**

G.P. Is that a yes or a no?

M.L. Yeah.

G.P. Okay. So ya'll pulled in down around the sandbar, split the money, and then where did you go after that?

M.L. Over to the other store.

G.P. And when you say "to the other store" are you familiar with Pembroke?

M.L. **No Statement Made**

G.P. But you went to another convenient store type establishment?

M.L. Yeah, across from Dairy Queen.

G.P. Okay. Who went in the store there?

M.L. Me and Gary.

G.P. And where was Ben on that one?

M.L. Driving.

G.P. Ben was driving?

M.L. **No Statement Made**

G.P. Did you carry a weapon in with you. . .

M.L. Huh uh.

G.P. when you went in the store? Did Gary carry a weapon in?

M.L. Yeah, Gary had one.

G.P. What did he carry in with him?

M.L. A pistol.

G.P. Okay. You stopped there apparently if you went in with a pistol and all you stopped there to rob that store, is that right?

M.L. We stopped there for something, I don't know.

G.P. Did ya'll discuss it before you went in, say "Ben you stay here and we're gonna go in and rob this" or what was the discussion?

M.L. We was all so drunk.

G.P. Okay. But you remember you went in, Gary went in, he had the pistol and Ben stayed in the car. What happened once you got inside?

M.L. Well. . .

G.P. Who went to the clerk, who talked to the clerk?

M.L. Gary.

G.P. Okay. And do you know what Gary asked her or told her?

M.L. No, she, but it must have been funny cause she was laughing, she wouldn't stop laughing.

G.P. Okay. Did Gary show her the gun?

M.L. Yeah.

G.P. And tell her this was a robbery?

M.L. Yeah.

G.P. And she was laughing?

M.L. **No Statement Made**

G.P. Okay. What happened, transpired at that time?

M.L. Some old man from outside come in and seen what taking and he tried taking the gun from Gary.

G.P. Uh huh. And then what happened?

M.L. Well, they got their stuff, we got broke up and we left.

G.P. Ya'll jumped back in the car?

M.L. Yeah.

G.P. Where did you get into, front or back?

M.L. I don't even remember, man. Back maybe.

G.P. Okay. And then you drove off?

M.L. Yeah.

G.P. What happened as you drove off?

M.L. Nothing really.

G.P. Do you recall someone firing a shot out the window because someone was following you?

M.L. Yeah.

G.P. Who fired the shot out the window?

M.L. I don't know. I don't know who fired the shot.

G.P. Alright. If Ben was driving, Gary was in the front seat and you were in the back, did you fire the shot?

M.L. I don't even know if I was in the back. I could have been in the front.

G.P. Okay.

M.L. I don't know.

G.P. Gary could have been in the back.

M.L. Yeah.

G.P. We know Ben was driving.

M.L. Yeah.

G.P. Well, did you fire the gun?

M.L. Huh uh.

G.P. Which gun was fired?

M.L. I don't know.

G.P. But you remember hearing a shot, but you don't know whether Ben or Gary fired it?

M.L. Right.

G.P. And then what happened shortly after that?

M.L. We lost 'em.

G.P. Okay. So you know the reason the gun was fired was cause someone was following you very closely?

M.L. Yeah.

G.P. Did they fire the gun at the car that was following you or just shooting it up in the air?

M.L. I don't know.

G.P. Okay. Do you remember what happened when your vehicle stopped?

M.L. **No Statement Made**

G.P. How come ya'll to stop and leave your car?

M.L. It blowed up.

G.P. Just stopped running with you?

M.L. Yeah.

G.P. What did ya'll attempt to do then?

M.L. Walk.

G.P. And then is that when the police showed up?

M.L. Uh huh.

G.P. What did Ben do when the police showed up?

M.L. I wasn't around, I don't know.

G.P. What did you do?

M.L. I was already gone.

G.P. Where did you go?

M.L. Running down the road.

G.P. Did you go into the wooded area at all?

M.L. **No Statement Made**

G.P. Was, that's a yes, is that right? You did go into the wooded area some?

M.L. **No Statement Made**

G.P. Where did Gary go?

M.L. I don't know, I lost him.

G.P. What did you carry with you when you left the car and took off running?

M.L. I didn't have nothing.

G.P. Was you carrying the pistol with you?

M.L. I didn't have shit man.

G.P. You didn't have the pistol with you. My understanding was you did have a pistol and I may be wrong.

M.L. No.

G.P. You didn't have the pistol?

M.L. Huh uh.

G.P. You didn't take any guns or anything with you when you ran?

M.L. Huh uh.

G.P. Okay.

M.L. Just spur of the moment man, I seen the law and I was gone.

G.P. And where were you picked up?

M.L. Huh?

G.P. Where were you picked up? Did the police pick you up?

M.L. Up there where that dude rents canoes on 460.

G.P. How did you get up there? Did you walk all the way, or run?

M.L. Jog.

G.P. Didn't get a ride or anything, jog all the way up there?

M.L. **No Statement Made**

G.P. Everything you told me is true, to the best of your recollection?

M.L. Yeah.

G.P. Okay. Take a break there and I'll be right back. Did you drink all that? I'll get you some more water here in a minute.

M.L. Alright.

G.P. What did you tell the police your name was?

M.L. Michael Raider.

G.P. Michael Raider? Why did you do that for?

M.L. I just did.

G.P. Is there a Michael Raider, do you know one?

M.L. Yeah.

G.P. How many people was with ya'll tonight? Not counting the guy that got shot?

M.L. Just me, Ben and Gary.

G.P. There never was a forth person then?

M.L. Huh uh.

G.P. Okay. Anything you wanna ask me?

M.L. Huh uh.

G.P. You, go ahead. . .

M.L. What all are you going to try and charge me for?

G.P. Well, here in Giles County, by your own admission and by statements of others, plus you'll be identified by the store owners and things, you'll be charged with two counts of armed robbery. And you'll be charged with using a fire arm in the commission of a felony. That doesn't necessarily mean that you had the gun on you, but a gun was used in the commission of a felony in that armed robbery. That's the things that I'll charge you with. Naturally, Blacksburg and Montgomery County and Floyd County officials are gonna be talking to you about what happened in their county. At any time today, have you fired a weapon at all?

M.L. Yeah.

G.P. Where did you fire a weapon?

M.L. I don't remember where it was at, but I did.

G.P. Do you remember what you shot at?

M.L. A beer can.

G.P. What, which weapon did you use?

M.L. A pistol.

G.P. Okay. My evidence tech, in a few minutes, I'll ask your permission to take a gun shot residue which is a little thing that they dab on you to collect any gun powder that's on you. If you say you shot the gun, then he'll probably find some, but he'll still do it as something that we have to do. He'll ask you permission to do it, so.

M.L. Yeah.

G.P. If you have no more questions of me, I will end the interview at 2:12 AM.

Transcribed by:

Christy Cumbee

Q. All right. And for those of us who don't know that much about Pembroke, is there a Dairy Queen near the M & W Mark, Market?

A. It's directly across from the Dairy Queen.

Q. Same side of the street?

A. No, sir, opposite side.

Q. Okay. And that was the only time you spoke with Mr. Mark Lilly about these incidents?

A. That's correct.

Q. Thank you. Answer any questions the defense may have, please.

THE COURT: Mr. Tuck.

CROSS-EXAMINATION

BY MR. TUCK:

Q. I'm going to draw your attention to page, well, I think they need to collect the transcripts first, but I'm going to draw your attention to Page 4 of the transcripts. I believe that Page 4, you ask a long question at the bottom of that, when did you, ah, and your brother and Ben and Gary, when did y'all get together today? And I believe Mark Lilly's response and

correct me if I'm wrong was, we'd been together a few days, well, me and Gary has, that's my brother's buddy. We all run around together. And it's his brother's buddy, is that correct? Is that what he said?

A. I'm, I'm still looking, sir.

Q. Okay. Page 4, center.

A. Okay.

Q. Now, he would later give you indications that he and Gary Barker were in fact living together, is that correct? He said that it was his brother's buddy, but later on he gave you indications that he, he being Mark Lilly, and Gary Barker were living together, is that correct, in Merrimac?

A. Yeah, I later learned that. I'm not sure exactly who furnished me that information.

Q. You didn't learn that information from Mark?

A. I may have. I just don't recall without refreshing my memory.

Q. Now, Page 5, I believe you were asking him about the, where they got the liquor at and I believe you

LT. R.L. HAMLIN: THIS IS LT. RON HAMLIN. MONTGOMERY COUNTY SHERIFF'S OFFICE. TODAY'S DATE IS DECEMBER 6, 1995. TIME IS 2:30 A.M. PRESENT DURING THIS INTERVIEW WILL BE INVESTIGATOR BOB FLEET, MONTGOMERY COUNTY SHERIFF'S OFFICE. WE'LL BE TALKING TO MARK LILLY, WHO LIVES IN RIVER. FIRST OFF, I'M GOING TO ADVISE MR. LILLY OF HIS MIRANDA RIGHTS. YOU HAVE THE RIGHT TO REMAIN SILENT. ANYTHING YOU SAY CAN BE USED AS EVIDENCE IN A COURT OF LAW. YOU HAVE THE RIGHT TO TALK TO A LAWYER, AND HAVE HIM PRESENT WITH YOU WHILE YOU'RE BEING QUESTIONED. IF YOU CANNOT AFFORD A LAWYER, ONE WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING, IF YOU WISH. IF YOU DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU STILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME. DO YOU UNDERSTAND WHAT I JUST TOLD YOU?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: YOU DO UNDERSTAND?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: OKAY, WOULD YOU SIGN RIGHT HERE, PLEASE?

(PAUSE)

LT. R.L. HAMLIN: OKAY, MARK, WE UNDERSTAND SOME THINGS HAPPENED TODAY. WELL, IT'S PASSED, IT'S YESTERDAY NOW, ON 12/5. WE NEED TO TALK TO YOU ABOUT WHAT'S HAPPENED YESTERDAY AND LED UP TO WHY WHAT WE'RE HERE RIGHT NOW AT 2:30 IN THE MORNING, OKAY?

MARK A. LILLY: ALL RIGHT.

LT. R.L. HAMLIN: IF YOU WOULD, LET'S TALK ABOUT HOW DID YESTERDAY START OFF?

MARK A. LILLY: I WAS DRUNK.

LT. R.L. HAMLIN: SIR?

MARK A. LILLY: I WAS DRUNK.

LT. R.L. HAMLIN: YOU WERE DRUNK YESTERDAY?

MARK A. LILLY: YEAH. DRUNK AS I EVER BEEN. WE PARTIED ALL NIGHT THE NIGHT BEFORE.

LT. R.L. HAMLIN: WHAT'S YOUR MIDDLE NAME?

MARK A. LILLY: ANTHONY.

LT. R.L. HAMLIN: OKAY, WHO WERE YOU WITH YESTERDAY?

MARK A. LILLY: BEN AND GARY BARKER. BEN LILLY AND GARY BARKER.

LT. R.L. HAMLIN: WHERE DID YALL GET TOGETHER AT?

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: COME HERE AND SPEAK UP. I'VE GOT TO GET THIS.

MARK A. LILLY: BEN COME OVER TO THE TRAILER ABOUT 9 OR 10 IN THE MORNING. WE WAS STILL IN THE BED.

LT. R.L. HAMLIN: BEN CAME TO YALL'S TRAILER?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: "YALL" IS BEN?

MARK A. LILLY: DO WHAT?

LT. R.L. HAMLIN: BEN IS YOUR BROTHER?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHERE'S THAT AT, WHERE DO YOU LIVE AT?

MARK A. LILLY: HOLLY COURT TRAILER PARK.

LT. R.L. HAMLIN: BEN LIVE THERE, OR IS THAT HIS PLACE OR YOURS?

MARK A. LILLY: NAH, IT'S JUST A PLACE ME AND GARY GO PARTYING. (INAUDIBLE)

LT. R.L. HAMLIN: HANG OUT SPOT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND THAT'S YOU AND UH, BEN. WHAT DID YALL DO FROM THERE?

MARK A. LILLY: STARTED DRINKING.

LT. R.L. HAMLIN: STARTED DRINKING?

MARK A. LILLY: YEAH. WE ALWAYS GET SOMETHING TO DRINK.

LT. R.L. HAMLIN: THEN WHAT ELSE DID YOU GET IN TO?

MARK A. LILLY: WENT TO FLOYD COUNTY.

LT. R.L. HAMLIN: ABOUT WHAT TIME?

MARK A. LILLY: IT WAS DARK.

LT. R.L. HAMLIN: IT WAS DARK?

MARK A. LILLY: YEAH. IT WAS, DRANK BEER, LIQUOR ALL DAY.

LT. R.L. HAMLIN: ABOUT WHAT TIME DID YOU GO TO FLOYD THEN, ABOUT FIVE? OR A LITTLE AFTER, FIVE-THIRTY?

MARK A. LILLY: YEAH, GIVE OR TAKE.

LT. R.L. HAMLIN: ALL RIGHT, WHAT DID YOU GO TO FLOYD FOR?

MARK A. LILLY: WE BROKE INTO A PLACE.

LT. R.L. HAMLIN: BREAK INTO A PLACE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHOSE PLACE WAS IT?

MARK A. LILLY: I DON'T KNOW. I DON'T, I BARELY EVEN REMEMBER IT.

LT. R.L. HAMLIN: WAS IT A HOUSE OR A STORE?

MARK A. LILLY: A HOUSE.

LT. R.L. HAMLIN: ALL RIGHT, HOW DID YOU GET OVER TO FLOYD?

MARK A. LILLY: UH, THE COUGAR, MERCURY COUGAR.

LT. R.L. HAMLIN: WHOSE CAR IS THAT?

MARK A. LILLY: IT'S BEN'S.

LT. R.L. HAMLIN: WHO WAS DRIVING?

MARK A. LILLY: UH, I DON'T KNOW.

LT. R.L. HAMLIN: YOU DON'T REMEMBER WHO WAS DRIVING?

MARK A. LILLY: NO, I ALWAYS RIDE IN THE BACK.

LT. R.L. HAMLIN: DID THAT CAR BELONG TO BEN?

MARK A. LILLY: UH-HUH.

LT. R.L. HAMLIN: YOU REMEMBER BREAKING INTO THE HOUSE?

MARK A. LILLY: NOT REALLY, NO.

LT. R.L. HAMLIN: DO YOU KNOW WHO BROKE IN? DID YOU GO INSIDE THE HOUSE?

MARK A. LILLY: UH, I GUESS.

LT. R.L. HAMLIN: YOU WENT INSIDE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: ALL OF YOU GO IN?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHAT DID YOU TAKE FROM THE HOUSE?

MARK A. LILLY: LIQUOR.

LT. R.L. HAMLIN: WHAT ELSE?

MARK A. LILLY: GUNS.

LT. R.L. HAMLIN: GUNS? WHAT KIND OF GUNS?

MARK A. LILLY: UH, THREE. A PISTOL AND SOME RIFLES.

LT. R.L. HAMLIN: TOOK ONE PISTOL? AND A RIFLE?

INV. R.F. FLEET: TWO RIFLES.

LT. R.L. HAMLIN: TWO RIFLES? THAT IT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND LIQUOR.

MARK A. LILLY: AND LIQUOR.

INV. R.F. FLEET: ANYTHING ELSE YOU CAN THINK OF?

MARK A. LILLY: NOT THAT I CAN THINK OF. I WAS SO DRUNK. I WAS DRUNK WHEN YOU BROUGHT ME IN HERE AT 1:30 THIS MORNING.

INV. R.F. FLEET: HOW YOU FEEL NOW?

LT. R.L. HAMLIN: WAS IT.....

MARK A. LILLY: I FEEL ALL RIGHT.

INV. R.F. FLEET: YOU'RE ALL RIGHT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: YOU KNOW WHERE YOU'RE AT?

MARK A. LILLY: YEAH, I'M IN JAIL.

INV. R.F. FLEET: WHERE AT?

MARK A. LILLY: IN GILES COUNTY.

LT. R.L. HAMLIN: OKAY, ONCE YOU LEFT FLOYD WHERE DID YOU GO?

MARK A. LILLY: I DON'T EVEN REMEMBER. (INAUDIBLE)

LT. R.L. HAMLIN: YOU CAME STRAIGHT....YOU DON'T REMEMBER COMING BACK FROM FLOYD? WHAT DO YOU REMEMBER NEXT? COME OVER HERE AND TALK.

MARK A. LILLY: DRUNK AS SHIT. THAT'S ALL I REMEMBER.

INV. R.F. FLEET: TELL US ABOUT WHAT HAPPENED AFTER YOU LEFT FLOYD, MARK.

LT. R.L. HAMLIN: WHEN YOU COME BACK TO MONTGOMERY COUNTY, WHAT DO YOU REMEMBER?

MARK A. LILLY: WE WENT BACK TO THE TRAILER AND DRANK SOME MORE LIQUOR.

INV. R.F. FLEET: THEN WHERE DID YOU GO?

MARK A. LILLY: UH, WENT TO GILES COUNTY FOR SOMETHING.

INV. R.F. FLEET: OKAY, AND WHAT HAPPENED THEN?

MARK A. LILLY: WE WERE IN SOMEWHERE OVER IN BLACKSBURG, THE CAR BROKE DOWN AND THE DUDE GOT ANOTHER CAR.

LT. R.L. HAMLIN: (INAUDIBLE)

INV. R.F. FLEET: TELL US ABOUT HOW THE DUDE GOT ANOTHER CAR.

MARK A. LILLY: PULLED OUT A GUN.

INV. R.F. FLEET: WHO WAS THE DUDE?

MARK A. LILLY: MY BROTHER.

LT. R.L. HAMLIN: ALL RIGHT, WHERE DID THIS HAPPEN AT?

MARK A. LILLY: STORE NEAR PRICE'S FORK (INAUDIBLE)

LT. R.L. HAMLIN: AND HOW COME HIM TO DO THAT?

MARK A. LILLY: DIDN'T WANT TO WALK I GUESS. (INAUDIBLE)

LT. R.L. HAMLIN: WHAT DID, WHAT HAPPENED TO THE COUGAR?

MARK A. LILLY: IT BROKE DOWN, MAN, THE BATTERY WENT DEAD. OH. YEAH, THE FUCKING TRANSMISSION WENT OUT.

LT. R.L. HAMLIN: ALL RIGHT, WHEN BEN, WHEN BEN PULLED THE GUN ON THE DUDE, WHERE WERE YOU AT?

MARK A. LILLY: STILL IN THE COUGAR.

LT. R.L. HAMLIN: YOU WERE STILL IN THE COUGAR? WHERE WAS GARY BARKER AT?

MARK A. LILLY: HE WAS STANDING BESIDE THE COUGAR.

LT. R.L. HAMLIN: YOU AND GARY WERE AT THE COUGAR?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: ALL RIGHT, WHAT HAPPENED THEN? WHAT DID YALL SEE HAPPEN?

MARK A. LILLY: WELL, BEN JUST TOLD US TO COME ON.

LT. R.L. HAMLIN: SO YALL WENT OVER THERE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: BEN TOLD YALL TO COME ON?

MARK A. LILLY: YEAH. WE WAS DRUNK MAN.

INV. R.F. FLEET: WHAT HAPPENED TO THE DUDE THAT OWNED THE CAR?

MARK A. LILLY: BEN SHOT HIM.

LT. R.L. HAMLIN: NO...

INV. R.F. FLEET: NOT YET.

LT. R.L. HAMLIN: WE'RE TALKING ABOUT AT THE STORE. NOW.

MARK A. LILLY: OH.

LT. R.L. HAMLIN: AT THE STORE WHEN BEN TOLD YALL TO COME ON, WHAT, WHAT HAPPENED TO THE BOY YOU TOOK THE CAR? THAT WAS DRIVING THE CAR, WHAT HAPPENED TO HIM?

INV. R.F. FLEET: I KNOW IT'S TOUGH, WE'RE JUST TRYING TO FOLLOW WHAT HAPPENED AT EACH PLACE. AND WE KNOW WHAT HAPPENED TO THE BOY.

MARK A. LILLY: YEAH. YEAH, MAN, SOMETHING ELSE, TOO. I'M GOING TO BE GETTING ALL THESE CHARGES AND THAT'S MY BROTHER I'M TELLING ON.

INV. R.F. FLEET: I KNOW THAT.

LT. R.L. HAMLIN: YEP.

INV. R.F. FLEET: YOU DIDN'T PULL THE TRIGGER, THOUGH.

MARK A. LILLY: I DIDN'T.

INV. R.F. FLEET: YOU DON'T NEED TO TAKE THE WRAP.

LT. R.L. HAMLIN: THAT'S RIGHT.

MARK A. LILLY: I KNOW, THEY'RE GONNA SEND ME TO THE PENITENTIARY ANYWAY (INAUDIBLE) GRAND JURY (INAUDIBLE) THEY GOT ME FOR ARMED ROBBERY. I KNOW YALL ARE GONNA BRING UP SOME KIND OF MURDER CHARGE.

INV. R.F. FLEET: THAT'S WHY WE'RE TALKING TO YOU. WE'RE TRYING TO HELP YOU RIGHT NOW, TRYING TO GET, YOU KNOW, TO FIND OUT WHO SHOT THIS BOY. NOW WE KNOW THAT YALL WERE THERE AND BEN PULLED THE GUN ON THIS GUY. AND YALL GOT IN THE CAR AND WENT DOWN TOWARDS MCCOY.

LT. R.L. HAMLIN: DID YOU, WHO MADE THE BOY GET IN THE CAR? DID YOU DO IT?

MARK A. LILLY: NO.

INV. R.F. FLEET: WHO DID?

LT. R.L. HAMLIN: WHO PUT THE GUN ON THE BOY AND MADE HIM GET IN THE CAR?

INV. R.F. FLEET: TELL THE TRUTH, MARK, FOR GOODNESS SAKES. WE'RE THE ONLY PEOPLE THAT ARE GOING TO HEAR RIGHT NOW AND THE ONLY PEOPLE GOING TO DO ANYTHING TO HELP YOU. NOW TELL THE TRUTH.

MARK A. LILLY: IT WAS BEN.

LT. R.L. HAMLIN: WHAT DID BEN TELL HIM?

MARK A. LILLY: I DON'T REALLY KNOW.

INV. R.F. FLEET: WHAT KIND OF GUN DID BEN HAVE?

MARK A. LILLY: PISTOL.

LT. R.L. HAMLIN: POINTED THE PISTOL AT HIM? WHAT DID THEY, WHERE WERE THE RIFLE AND SHOTGUN AT THAT TIME?

MARK A. LILLY: I DON'T EVEN KNOW. I WASN'T WORRIED ABOUT NO GUN I WAS DRUNK, THE ONLY THING I KEEP UP WITH MAN IS THE BEER.

INV. R.F. FLEET: THAT'S A GOOD THING TO KEEP UP WITH.

MARK A. LILLY: I AIN'T TRYING TO BE SMART. I DRINK ALL THE TIME.

LT. R.L. HAMLIN: ALL RIGHT, SO YALL LEFT THE STORE. THEN...

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: BACK TOWARDS....PRICE'S FORK?

MARK A. LILLY: I DON'T KNOW. LET ME ASK YALL A QUESTION, WHERE WAS THE BODY FOUND?

INV. R.F. FLEET: WHERE WAS WHAT?

MARK A. LILLY: THE BODY FOUND?

LT. R.L. HAMLIN: WE FOUND HIM IN WHITETHORNE.

INV. R.F. FLEET: WHITETHORNE.

MARK A. LILLY: WHITETHORNE?

LT. R.L. HAMLIN: OUT PRICE'S FORK.

INV. R.F. FLEET: YOU KNOW WHERE THE BOAT LANDING IS AT WHITETHORNE?

MARK A. LILLY: I DON'T KNOW.

INV. R.F. FLEET: YOU KNOW WHERE THE RAILROAD TRACKS? REMEMBER RAILROAD TRACKS?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: IS THAT WHERE YALL WENT? TOWARDS THE RAILROAD TRACKS?

MARK A. LILLY: BUDDY, I CAN'T EVEN THINK. I DON'T KNOW.

LT. R.L. HAMLIN: SO YALL, WHERE WAS THE GUY SEATED AT WHEN YOU LEFT?

MARK A. LILLY: IN THE BACK SEAT BESIDE THE WINDOW.

LT. R.L. HAMLIN: WHAT WAS HE SAYING?

MARK A. LILLY: NOTHING.

INV. R.F. FLEET: WAS HE SCARED?

MARK A. LILLY: HE DIDN'T REALLY ACT IT, YOU KNOW.

LT. R.L. HAMLIN: WERE YALL HAVING A CONVERSATION, WAS BEN AND UH, MARK, NOT MARK, BEN AND GARY TALKING? WERE YOU TALKING?

MARK A. LILLY: NO, NOBODY TALKED.

LT. R.L. HAMLIN: NOBODY SAID A WORD? AND BEN DROVE THE CAR?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: OKAY, SO YOU END UP IN AN ISOLATED SPOT OUT IN THE COUNTY SOMEWHERE. THAT'S ALL YOU REMEMBER, RIGHT? YOU WITH ME? YES OR NO?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: SO YOU GO TO AN ISOLATED SECTION OF THE COUNTY. WHAT DO YOU REMEMBER ABOUT THE ISOLATED SECTION THAT WE'RE TALKING ABOUT? WHEN YALL STOPPED WITH THE GUY?

MARK A. LILLY: BIG OLD TANKS.

LT. R.L. HAMLIN: BIG TANKS?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHAT ELSE DO YOU RECALL?

MARK A. LILLY: THAT'S ABOUT IT.

LT. R.L. HAMLIN: REAL DARK?

MARK A. LILLY: YEAH, IT WAS DARK.

LT. R.L. HAMLIN: YOU REMEMBER RAILROAD TRACKS. BRIDGES?

MARK A. LILLY: SOMETHING LIKE THAT.

LT. R.L. HAMLIN: OH, WELL, WE'RE TRYING TO HELP YOU, WE'RE NOT TRYING TO LEAD YOU INTO ANYTHING.

MARK A. LILLY: I WASN'T DRUNK ENOUGH, YOU KNOW, I KNOW THAT I DIDN'T PULL NO DAMN TRIGGER. (INAUDIBLE)

LT. R.L. HAMLIN: OKAY.

INV. R.F. FLEET: OKAY, THAT'S GOOD. THAT'S GOOD.

LT. R.L. HAMLIN: ALL RIGHT...

INV. R.F. FLEET: YOU REMEMBER RAILROAD TRACKS? YOU SAID THAT RINGS A BELL.

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: YOU REMEMBER A PILE OF JUNK OR ANYTHING LIKE THAT, WHAT ELSE?

MARK A. LILLY: I WASN'T PAYING ATTENTION.

INV. R.F. FLEET: A FIELD? A BIG, OLE CORN FIELD, LIKE?

LT. R.L. HAMLIN: YEAH, A BIG, OLE FIELD THERE BEHIND IT.

INV. R.F. FLEET: IT'S SORT OF ISOLATED, RIGHT? WASN'T ANYTHING REALLY AROUND? JUST LIKE A BIG GRAVEL LOT, WASN'T IT? IS THAT WHAT IT WAS? REMEMBER THAT?

LT. R.L. HAMLIN: DID YOU GET OUT OF THE CAR?

MARK A. LILLY: I STAYED IN THE CAR.

LT. R.L. HAMLIN: YOU NEVER DID GET OUT OF THE CAR?

INV. R.F. FLEET: WHERE WERE YOU SITTING?

MARK A. LILLY: I WAS SITTING IN THE PASSENGER. BEHIND THE PASSENGER SEAT. I NEVER GOT OUT OF THE CAR.

LT. R.L. HAMLIN: DID GARY GET OUT OF THE CAR?

MARK A. LILLY: NUH-HUH.

LT. R.L. HAMLIN: THE ONLY TWO PEOPLE THAT GOT OUT WAS BEN...

MARK A. LILLY: AND THE DUDE.

LT. R.L. HAMLIN: WHAT DID, HOW DID YALL GET HIM OUT? DID BEN JUST SAY COME ON, GET OUT?

MARK A. LILLY: YEAH. JUST LIKE THAT.

LT. R.L. HAMLIN: AND THE GUY GOT OUT.

MARK A. LILLY: YEAH.

INV. R.F. FLEET: AND THEN WHAT?

MARK A. LILLY: AND THAT'S WHEN BEN SHOT HIM.

LT. R.L. HAMLIN: WHAT KIND OF WEAPON DID BEN HAVE THEN?

MARK A. LILLY: THE PISTOL.

INV. R.F. FLEET: (INAUDIBLE) WHAT DO YOU MEAN?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: AND WHO HAD THE GUN?

MARK A. LILLY: BEN.

LT. R.L. HAMLIN: BEN?

INV. R.F. FLEET: AND WHAT KIND OF GUN WAS IT?

MARK A. LILLY: .38.

INV. R.F. FLEET: AND WHERE WERE YOU SITTING AT, OR WHERE WERE YOU AT?

MARK A. LILLY: I WAS STILL IN THE CAR.

INV. R.F. FLEET: DID YOU SEE THE SHOT?

MARK A. LILLY: I SAW HIM FIRE.

INV. R.F. FLEET: DID YOU KNOW WHAT HAPPENED?

MARK A. LILLY: YEAH. I DIDN'T KNOW WHAT TO THINK, MAN.

LT. R.L. HAMLIN: WHEN, AT WHAT POINT DID YOU TAKE THE CLOTHES OFF OF THE GUY? DO YOU REMEMBER THAT?

MARK A. LILLY: I GUESS THEY TOOK THEM OFF WHEN THEY WAS OUTSIDE FUCKING AROUND.

LT. R.L. HAMLIN: BEN TELL HIM TO TAKE HIS CLOTHES OFF, YOU REMEMBER THAT?

MARK A. LILLY: I COULDN'T HEAR WHAT THEY WERE SAYING.

LT. R.L. HAMLIN: DID YOU SEE THE GUY TAKING HIS CLOTHES OFF THOUGH? DID YOU SEE ANYTHING?

MARK A. LILLY: I SEEN THE DUDE TAKING HIS SHIRT OFF, SHOES.

LT. R.L. HAMLIN: THE DUDE WAS TAKING HIS SHIRT AND PANTS AND STUFF OFF? AND WHAT WAS BEN SAYING?

MARK A. LILLY: I DON'T KNOW. YOU KNOW WE HAD THE MUSIC BLAIRING. IT WAS PRETTY COLD OUTSIDE, THE WINDOWS WERE UP.

LT. R.L. HAMLIN: ALL RIGHT. DID BEN GET BACK IN THE CAR, WAS HE GOING TO DRIVE OFF AND LEAVE THE GUY THERE TO WALK AWAY? DID BEN TELL HIM THAT HE WAS GOING TO LEAVE HIM THERE OR DID THEY JUST STAY OUTSIDE THE WHOLE TIME AND THEN BANG, BANG? AND THAT WAS IT?

MARK A. LILLY: THAT'S PRETTY MUCH IT.

LT. R.L. HAMLIN: BEN NEVER GOT BACK IN THE CAR UNTIL AFTER THE SHOOTING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: HE DIDN'T GET IN THE CAR AND START TO DRIVE OFF AND SAY 'OH, I FORGOT, HE KNOWS ME NOW, HE'S SEEN ME' AND STOP THE CAR AND GOT OUT?

MARK A. LILLY: NO, MAN.

LT. R.L. HAMLIN: THE WHOLE TIME, WHEN BEN STOPPED THE CAR AND GOT THE GUY OUT, BEN NEVER GOT BACK IN THE CAR? HE SHOT HIM BEFORE HE GOT BACK IN WITH YOU, IS THAT CORRECT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: OKAY. DID YALL LEAVE THERE PRETTY QUICK? DID YOU SPIN GRAVEL AND TAKE OFF?

MARK A. LILLY: WE LEFT TOWN PRETTY QUICK, YEAH.

LT. R.L. HAMLIN: HOW MANY TIMES DO YOU THINK HE SHOT HIM? COULD YOU HEAR SHOTS?

MARK A. LILLY: A COUPLE.

LT. R.L. HAMLIN: A COUPLE OF SHOTS.

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: THEN YALL LEFT MCCOY. WHICH WAY DID YOU GO THEN? YOU COME TO GILES.

MARK A. LILLY: WE WENT TO GILES, WE WAS GOING OUT SOME BACK ROAD.

LT. R.L. HAMLIN: OUT THE BACK ROAD?

MARK A. LILLY: YEAH, THROUGH THAT LONG. STRAIGHT STRETCH ABOUT THE CURVE.

LT. R.L. HAMLIN: OKAY, NOW, AFTER SEEING SOMETHING LIKE THAT, YOU AND CARY, AFTER THIS HAPPENED, WHAT WAS SAID AFTER BEN GOT BACK IN THE CAR? WHAT DID YALL TALK ABOUT?

MARK A. LILLY: NOTHING. I COULDN'T FIGURE IT OUT. I LIKE TO SHIT IN MY PANTS.

LT. R.L. HAMLIN: YALL DIDN'T TALK ABOUT ANYTHING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: DID BEN SAY ANYTHING ABOUT SHOOTING HIM? BEN SAY 'WELL, I CAPPED HIM'? DID HE SAY ANYTHING?

MARK A. LILLY: WE WAS ALL STUNNED.

LT. R.L. HAMLIN: BEN WASN'T STUNNED WAS HE?

MARK A. LILLY: I DON'T KNOW IF HE WAS OR NOT. HE DIDN'T SAY MUCH. I KNOW GARY WAS.

LT. R.L. HAMLIN: YEAH.

MARK A. LILLY: I KNOW HE AIN'T SEEN NOTHING LIKE AND I HADN'T EITHER.

LT. R.L. HAMLIN: YALL HAVE NEVER SEEN NOTHING LIKE THAT HAD YOU?

MARK A. LILLY: NO.

INV. R.F. FLEET: YALL DIDN'T TALK AND BEN DIDN'T SAY ANYTHING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: YOU BOUND TO HAVE TALKED ABOUT SOMETHING. MAN.

INV. R.F. FLEET: HE SHOT THIS GUY AND NEVER SAID A WORD?

MARK A. LILLY: NOT THAT I KNOW OF. MAINLY TALKED AMONG EACH OTHER.

LT. R.L. HAMLIN: BEN WAS DOING THE DRIVING STILL YET?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: (INAUDIBLE)

LT. R.L. HAMLIN: SO YOU COME TO GILES COUNTY. WHO COME UP WITH THE IDEA LET'S UH, WE KNOW YOU ROBBED A COUPLE OF STORES OVER HERE, RIGHT?

INV. R.F. FLEET: STUCK UP A COUPLE OF PLACES. REMEMBER THAT?

MARK A. LILLY: I WAS WITH THE PEOPLE THAT DID IT.

INV. R.F. FLEET: REMEMBER THAT?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: GARY AND BEN.

LT. R.L. HAMLIN: YEAH, OKAY. WHAT, WHEN WAS THAT DECISION MADE? WAS THAT MADE ON THE WAY TO GILES? LET'S GO OVER TO GILES? WHEN YALL GOING TO ROB STORES AND LEAVE THIS AREA OR....?

MARK A. LILLY: I DON'T KNOW, MAN, IT JUST ALL HAPPENED, LIKE THAT, BAM, BAM. THE ROBBERY JUST HAPPENED LIKE THAT.

INV. R.F. FLEET: WHOSE IDEA WAS THAT?

LT. R.L. HAMLIN: YEAH, WHO COME UP WITH THAT?

MARK A. LILLY: I DON'T KNOW.

LT. R.L. HAMLIN: DID YALL NEED SOME MONEY?

MARK A. LILLY: WE WAS BROKE.

LT. R.L. HAMLIN: YOU WERE BROKE.

MARK A. LILLY: YEAH. (INAUDIBLE)

LT. R.L. HAMLIN: DID YOU GET ANY MONEY OFF OF THE GUY THAT YOU LEFT OVER THERE IN MONTGOMERY? DID HE HAVE ANY MONEY ON HIM?

MARK A. LILLY: I DON'T KNOW THAT.

LT. R.L. HAMLIN: ALL YOU KNOW IS YOU TOOK THE CLOTHES. TAKE HIS WATCH OR ANYTHING?

MARK A. LILLY: I DON'T KNOW NOTHING ABOUT THAT SHIT, MAN. I STAYED IN THE CAR.

LT. R.L. HAMLIN: YOU DON'T KNOW. OKAY. SO YOU COME TO GILES AND THEN EVERYTHING JUST CLICKED AND A COUPLE OF PLACES OVER HERE.

MARK A. LILLY: YEAH, IT JUST ALL HAPPENED QUICK. THEY WAS DRUNKER THAN HELL, TOO.

LT. R.L. HAMLIN: SO. THEN THE NEXT THING YOU KNOW YOU'RE CAUGHT AND BROUGHT INTO THE SHERIFF'S OFFICE?

MARK A. LILLY: YEAH. I WAS WALKING UP 430. NEVER SEEN SO GODDAMN MANY LAW IN MY LIFE.

LT. R.L. HAMLIN: DID YOU GET ANY MONEY OUT OF THESE STORES YOU WERE ROBBING OVER HERE?

MARK A. LILLY: A FEW DOLLARS. BOTH THEM MOTHER-FUCKERS ARE BROKE AS IT WAS.

LT. R.L. HAMLIN: SO AFTER YOU ROBBED THIS SECOND PLACE THE NEXT THING YOU KNOW IS YOU WERE APPREHENDED BY GILES COUNTY. IS THAT RIGHT?

MARK A. LILLY: YEAH (INAUDIBLE)

LT. R.L. HAMLIN: YOU WERE DRUNK AND TRYING TO RUN AWAY AND THEY CAUGHT YOU, HUH?

MARK A. LILLY: THEY DIDN'T CATCH ME RUNNING.

LT. R.L. HAMLIN: ANYTHING ELSE?

INV. R.F. FLEET: I WANT TO GO BACK, MARK. TO RIGHT AFTER THE SHOTS WERE FIRED. YOU WERE IN THE CAR, BEHIND THE PASSENGER SEAT. WHO WAS IN THE FRONT SEAT?

MARK A. LILLY: GARY.

INV. R.F. FLEET: YALL HEARD AND SAW A COUPLE OF SHOTS. MUSIC WAS PLAYING. BEN COMES AND GETS BACK IN THE CAR AND YALL TAKE OFF. GARY, UH, GARY DIDN'T SAY ANYTHING?

MARK A. LILLY: NO, ME AND GARY SAYS 'GODDAMN'. MOTHER-FUCKER SHOT HIM.

LT. R.L. HAMLIN: SAID WHAT?

MARK A. LILLY: SAID 'GODDAMN.'

LT. R.L. HAMLIN: BOTH OF YOU DID?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND THEN BEN JUMPS IN AND DOWN THE ROAD YOU TAKE OFF.

INV. R.F. FLEET: AND WHAT DID BEN SAY?

LT. R.L. HAMLIN: DID BEN SAY 'I SHOT THE DUDE'? 'HE'S DEAD'?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: HE FELT LIKE HE WAS DEAD? (INAUDIBLE)

LT. R.L. HAMLIN: DID BEN SAY 'I SHOT THE DUDE AND I THINK HE'S DEAD'? YOU REMEMBER THAT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: YOU DO REMEMBER THAT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: ANYTHING ELSE?

LT. R.L. HAMLIN: OTHER THAN BEING SCARED AS HELL, HUH?

MARK A. LILLY: YEAH, THAT'S THE TRUTH, MAN.

LT. R.L. HAMLIN: I KNOW, I CAN TELL LOOKING AT YOU, YOU'RE SCARED TO DEATH.

MARK A. LILLY: SEE SOMEBODY BLOWN AWAY, GODDAMN.

INV. R.F. FLEET: I KNOW.

MARK A. LILLY: I AIN'T NO VIOLENT PERSON. I'VE NEVER BEEN ARRESTED FOR VIOLENT CRIMES, YOU KNOW.

INV. R.F. FLEET: ALL RIGHT, THAT'S THE END.

LT. R.L. HAMLIN: OKAY, THIS WILL BE THE END OF THE INTERVIEW. THE TIME IS 2:53 A.M.

END

pistol. Does this look familiar?

A. Yes, it does.

Q. All right. And why does that look familiar?

A. Well, that gun was one of the guns that was brought in that evening.

Q. All right. And you indicated the guns came out one more time. What was done with the guns when they came out?

A. Well, ah, one of the guns was, ah, kind of pointed at, at me and, ah, I'm not sure if it was in a joking manner or, or what, but -

Q. Which one of the guns were pointed at you?

A. It was the, ah, it was the 30/30.

Q. 30/30 rifle?

A. Yes, sir.

Q. And who was pointing the gun at you?

A. Gary.

Q. Do you know whether it was loaded or not?

A. I have no idea.

Q. All right. So, he pointed it at you and

you said you didn't under-, know whether was, he was joking and you didn't know whether he was not joking?

A. Right.

Q. Well, what, what lead you to that conclusion?

A. Well, -

MR. SCHWAB: Objection, Your Honor. That answer calls for a conclusion.

MR. TUCK: What factors? He, he, he has a conclusion. He's -

THE COURT: I, I, I do sustain that, but go ahead and rephrase. I think you can get to it.

Q. What factors specifically, I'm talking about what factors specifically lead you to believe that you didn't know whether he was joking or not?

A. Well, we were drinking and, ah, you know, when, when a person is on alcohol, you know that they don't always do the things that they mean to do -

Q. All right.

A. And so that's why, what brought me to the assumption that, you know, he might have been joking and

A. No, sir.

Q. And what are they saying, well, strike that question. Now, so they come up there and they're talking and what occurs after the conversations?

A. Ah, there was, ah, there was just a few words exchanged, ah, the neighbor we went to go visit got a little harsh and, ah, then after that, ah, I seen the, ah, Mark with the, with the gun, with the gun that you just showed me there.

Q. The pistol?

A. Yes, sir.

Q. Where did Mark have it on his person?

A. He had it in, in, ah, a sweater jacket with a pocket on it and a hood.

Q. And what was he doing with that weapon?

A. Well, I, I heard it, I heard it click back.

Q. And you say you heard it click back. What are you talking about?

A. The pistol.

Q. All right. You heard it click back again.

You heard the pistol click back. Was there a portion of the pistol you heard click back?

A. Well, the hammer.

Q. All right. And what did you see?

A. Ah, I saw it brought out just, just a little bit, not much. You could barely even see it. It was just -

Q. And what did you do when you saw the gun coming out?

A. I looked at him.

Q. And is that it? You just looked at him?

A. I looked at him and kind of pointed my finger towards him.

Q. And why did you -

A. Then -

Q. Why did you do that?

A. Well, I had a feeling that the gun was going to be pulled.

Q. Let, whoa, whoa, whoa. You, you can't get into your feeling. I -

MR. SCHWAB: That's okay, Your Honor.

Q. You saw it coming out?

A. Yes.

Q. And you pointed at him. I, I cut your answer off when you were asking, answering that question. You were pointing it, a, the finger -

A. Right.

Q. At Mark Lilly and you were getting, did you say something when you pointed the finger?

A. No, I didn't say anything.

Q. Okay. And what did he do when you pointed at him after he pulled the hammer back on the, the revolver?

A. He put the gun away.

Q. He slid, when he said put it back, where did he put it?

A. He, he, he slid it back in his pocket. He didn't have it all the way out. He just slid it back in his pocket.

Q. Now, you indicated, ah, that there was some, ah, like heated words, is that correct?

A. Yeah, ah, it, ah, the neighbor, the

neighbor that we went to go visit got a little harsh like I said.

Q. He got a little harsh?

A. She got a little harsh.

Q. She got a little harsh. She was angry?

A. Ah, no, she wasn't angry. She's just that way.

Q. Okay. I think we probably all know a few people and that's when Mark pulled out the revolver and pulled the hammer back?

A. Correct. He didn't pull it out all the way. He just slid it out a little bit.

Q. And, and pulled the hammer back on it?

A. Right.

Q. And they weren't drinking at that point in time?

A. No, sir.

Q. Okay. When, all right, he pulls the hammer back. What happens after that?

A. Well, ah, after he slid it back in his pocket and everything they got up and left.

A. But as he leaned on the bar, well, I watched, I was looking at him.

Q. And he looked at you right in the face?

A. Yes, sir, he did.

Q. And did he tell you -

A. He told me, he told me to not to look at him either.

Q. He told you not to look at him?

A. Yes, sir, he did.

Q. And did he have anything in his hand?

A. And at that time I was, at that time I was very shook up just to tell you the truth.

Q. I can imagine. Did he have anything in his hand?

A. Yes, sir, he did. That's what I said, he had a pistol in his hand pointed at me.

Q. Does this resemble or the pistol that he had in his hand?

A. Well, I'll have to say that at that time I was probably so scared that I thought it looked bigger, but it did look a little bit bigger, but, yes, it does

there was something in your mind? Was there a reason why you didn't want Michael to go?

A. Well, the remark that Gary had made, yes, sir.

Q. All right. And what was that remark specifically?

A. That he could kill his best friend without regretting it.

Q. And that was the reason that you didn't want your son to go with them?

A. Yes, sir.

Q. All right. And this was approximately 1:30 the afternoon of December the 5th, is that correct?

A. Yes, sir.

Q. All right. Your Honor, that would be all the questions I have for this witness. We would offer it for the truth of her, why she did things. Not for the truth of the matter asserted, which was a different ground than we originally based it under. We would also raise it under the ability to be able to impeach for the reasons stated earlier. This is, would be her testimony

Q. Okay. I'm asking you what happened?

A. What happened.

Q. Just start from the beginning. Let's start off with what you saw happen and then I'll stop you if, if I have any questions. How's that?

A. Well, -

Q. Just go from the beginning and, and, you've got -

A. Word for word, I really don't know what was said.

Q. Well, I'm not asking you what -

A. Ah, but we know that a gun was pointed at Howard.

Q. All right.

A. He was told to get on the floor.

THE COURT: I think if she didn't hear any statements made, I think she needs to confine her testimony -

MR. TUCK: All right.

THE COURT: To what she herself observed.

Q. Okay.

A. And I pushed him kindly back in a, the gun hit me in the stomach, you know, the barrel -

Q. Uh-huh.

A. And I don't know what happened. I just backed up.

Q. All right. Did he say anything to you at that point in time?

A. Yes, sir.

Q. What did he say to you?

A. He said, I'll blow your head off.

Q. Okay. And who was that that had the gun?

A. The blonde headed fellow.

Q. All right. Did he point the gun at you when he said that?

A. Yes, sir, he sure did.

Q. And what did he do after that? I mean -

A. I, I told the clerk, I said, give him the damn money, Mona.

Q. And then what did you do after that?

A. And the other, the other guy walked, got,

key every way I could. Well, Bill come in about that time, and he said, what's wrong, Mona, and Barkley says, lay in the floor.

Q. Where was the gun when he -

A. On the counter.

Q. On the counter.

A. And Bill grabbed him and they went in a candy rack and, of course, he dropped the gun, but Barkley got it and he pointed the gun at Bill, he said, I'll shoot your damn head off.

Q. All right. Now, how far did, I believe you called him Barkley. Was he the short guy?

A. Yes.

Q. How far was the gun away from Bill?

A. You mean after he pointed it at his head?

Q. Yeah. Yes, ma'am.

A. It was right up to, almost at him.

Q. Almost at him. Ah, within two feet of him?

A. Well, about like this. Well, no, you come a little closer.

Q. Okay.

A. And it was up like this.

Q. Looked like that?

A. So, -

Q. And then, all right, go ahead. I'm sorry.

A. When I looked because I felt like he, he was going to get me and when I looked he had the gun right up and Bill and the hammer was back on it. He said to Mark Lilly, he said, get the money and run. So, he run.

Q. The hammer was cocked back on that pistol?

A. On the gun.

Q. On the gun.

A. Because I was standing right there looking right at him.

Q. And then what happened after that?

A. Well, after Mark grabbed the money and run why he run.

Q. Did you see the automobile that they came in leave the convenience store?

A. Yes, I did.

things you wanted to tell the Court.

A. Sure.

Q. What is it that you want to tell the Court today?

A. Well, in some of the statements that me and Mr. Barker, Gary, give the cops and some of Gary's testimony from what I understand, it ain't really what happened.

Q. What specifically isn't really what happened?

A. Well, like the robbery, I said that -

Q. Which robbery? There were three that night.

A. Well, all three of them. One of the, in the statements and in Gary's testimony when he testified that it was Ben, he said that, ah, Ben was going to rob the boy. Ben never did because I did. I took Twenty-one ($21.00) Dollars off of him.

Q. So you lied to the police that night?

A. Yeah.

Q. How do we know that you're not lying now?

A. You tell me. I'm telling the truth now. You know, at the time, I was scared. The investigator started talking all these life sentences, you know, I could get and I got scared man. Throw it off on somebody else.

Q. Is there anything else you want to tell the Court?

A. Us see. Not that I can think of.

MR. TUCK: Your Honor, if I might have a moment.

THE COURT: Yes, sir.

Q. Did you, you told the police that you saw your brother kill Alexander Defilippis, is that correct?

A. Yeah, that's what I had said, but I, I can't say that for sure. I can't say for sure who killed him, you know, either party. I can't say for sure.

Q. Why's that?

A. Because at the time of the shooting, I was on the other side of the car throwing up all the liquor and beer that I had been drinking throughout the day.

Q. Now, you told the police that you never

exited the vehicle down at Whitethorne Landing. Did you lie then?

A. Yeah. Everything I told the cops I lied.

Q. You are aware that they placed that statement that you gave to the police before the jury, is that correct?

A. Yeah.

Q. And you did nothing to come forward at that point in time?

A. Right.

Q. And why is that?

A. I hadn't been to Court yet.

Q. Please answer any questions that Mr. Schwab might have for you or the Court.

THE COURT: Thank you, Mr. Tuck. Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. So, everything you told the police was a lie?

A. Yeah.

Q. So you did kill him, is that what you're saying?

A. Ah, -

Q. You told the police you didn't kill him, so if you lied about everything, then you must have killed?

A. I never killed him.

Q. Who killed him?

A. I don't know. I can't say for sure who killed him.

Q. Who had the pistol?

A. At the time of the murder? I can't say for sure because I don't know.

Q. Did you have the pistol before the murder?

A. No.

Q. Who had the pistol?

A. I can't say for sure, you know, because I do not know.

Q. You don't know?

A. Right.

Q. You had the pistol up till the time you

Q. Did anybody in your family encourage you to call Mr. Tuck?

A. Huh-uh.

Q. Does it have anything do to with your being here today that there's a custody petition concerning your child pending in the J & D Court?

A. I don't see where my kid has anything to do with it while we are here now.

Q. Well, that's my point. Does it or doesn't it? You didn't call Mr. Tuck until after your mother filed to have custody of your child?

A. That ain't got nothing to do with it, man.

Q. Why do you blame it on Gary Barker instead of your brother?

A. Well, me and Gary we, we've been, we've been in a whole lot of trouble together and Gary knows a whole lot on me and if it was to do over, I wouldn't have told y'all nothing, you know. I wouldn't told y'all nothing. I would have took the Fifth.

Q. So, you don't know that your brother didn't kill him, do you?

What is the legal definition of "circumstantial evidence"?

principal in the second degree to

filed 10:25 [illegible]
6:55pm [illegible] circuit court [illegible] clerk

3418

506

IN THE

SUPREME COURT OF VIRGINIA

Record Nos. 972385 and 972386

BENJAMIN LEE LILLY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

MARK L. EARLEY
Attorney General of Virginia

KATHERINE P. BALDWIN
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

c. Any error was harmless.

Lilly's confrontation argument should be rejected because the trial court properly exercised its discretion in allowing the hearsay into evidence and because the hearsay clearly did not violate the Confrontation Clause. However, even if an error had occurred, it would have been harmless in this case. See Lee v. Illinois, 476 U.S. 530, 547 (1985) (confrontation violation does not "foreclose the possibility that [the] error was harmless when assessed in the context of the entire case against [the defendant]"); Schindel v. Commonwealth, 219 Va. 814, 817, 252 S.E.2d 302, 304 (1979) (erroneously admitted hearsay harmless when the content of the out-of-court statement is clearly established by other evidence). Here, the other evidence overwhelmingly proved that Benjamin Lilly committed the capital murder. Gary Barker was an eyewitness who observed Lilly abduct, rob and murder Alex DeFilippis. (JA 2025-2173). Barker's trial testimony was far more detailed than Mark's pretrial statements, and it thoroughly corroborated Mark's statements. (JA 2254-2282, 2318-2332).

It was the defendant's car that was used in the initial part of the crime spree and the defendant's car that broke down, necessitating replacement with another vehicle, and such action most likely was undertaken by the owner of the disabled car. When he was apprehended wielding a shotgun, the defendant lied to the police officers about his identity and that of his accomplices, and that deceptive behavior most likely was engaged in by a guilty person. The defendant made incriminating statements: at the apprehension site, the defendant called to his brother to give himself up because he was "not the one who has done anything wrong;" in the police car, he asked Officer Whitsett to kill him and when the officer asked what a murderer looked like, said "me." A forensic examination of the accomplices' clothing found blood on the defendant's pants leg, yet no blood on Mark's clothes and no blood on Gary's clothes that was not his own.

When assessed in the context of the entire case against the defendant, it is clear that

his guilt was established by evidence independent of the hearsay statements and that the admission of the hearsay, even if erroneous, was harmless beyond a reasonable doubt.

3. The Trial Court Properly Denied the Motion to Suppress Lilly's Statements Made to Officer Whitsett. (Assign. Error 24, 25)

Lilly argues that the trial court erred in admitting into evidence the statement he made to Officer Whitsett while he was sitting in a police car after he had been apprehended. The challenged statement was Lilly's response "me," made after Whitsett asked, "what does a murderer look like?" (JA 263). Lilly says that the response "me," should not have been admitted because Whitsett had not given him warnings under Miranda v. Arizona, 384 U.S. 436 (1966), and because Whitsett's recollection of the response was not clear or positive. Neither argument, however, demonstrates error.

First, there was no Miranda error because Whitsett was not required to give the warnings. Miranda applies only to "custodial interrogation." Custodial interrogation takes place when an officer expressly questions a suspect in custody with questions he knows are "reasonably likely to elicit an incriminating response." Jenkins v. Commonwealth, 244 Va. at 453, 423 S.E.2d at 365 (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). The police do not "interrogate" a suspect simply by responding to questions initiated by the suspect. Jenkins, 244 Va. at 453, 423 S.E.2d at 365. A suspect's statements in such situations are considered "volunteered" and outside the strictures of Miranda. See id.; Wave v. Commonwealth, 219 Va. 683, 693, 251 S.E.2d 202, 208 (Miranda does not apply to volunteered statements or to responses to general "on-the-scene questioning as to facts surrounding a crime") (quoting Miranda, 384 U.S. at 477, 478), cert. denied, 442 U.S. 924 (1979).

As the trial court found, when Lilly made his statement, "me," he was not being interrogated. (JA 362). Lilly was apprehended and placed in a police car while the officers searched for the other robbery suspects. (JA 258). Whitsett was standing guard by the car